Petition

81-1359

Office - Supreme Court, U.S.
FILED
JAN 19 1982
ALEXANDER L. STEVAS,
CLERK

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COTTON PETROLEUM CORPORATION,
Petitioner,

v.

JAMES B. EDWARDS, Secretary of the United States Department of Energy, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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January 19, 1982

QUESTIONS PRESENTED FOR REVIEW

1. May the Government's unique prerogative in civil litigation to withhold relevant documents from discovery on grounds of executive privilege be validly asserted by agency trial counsel alone, without the direction of the agency head following his personal consideration of the documents as required by *United States* v. *Reynolds*, 345 U.S. 1 (1953)?

2. May the initial burden of reviewing copious agency documents be shifted to the Federal District Courts by compelling *in camera* inspection without an affidavit or other evidentiary showing that the documents qualify for the claimed executive privilege?

PARTIES TO THE PROCEEDING

The decision of the Temporary Emergency Court of Appeals issuing a writ of mandamus is captioned as follows: *The United States Department of Energy, James B. Edwards, Secretary of Energy and the United States of America* v. *The Honorable Thomas R. Brett, United States District Judge for the Northern District of Oklahoma.* The Orders in District Court to which the writ of mandamus relates are captioned as follows: *Cotton Petroleum Corporation* v. *James B. Edwards, Secretary of Energy, and the United States of America.*

The following corporations are parents or affiliates of Petitioner Cotton Petroleum Corporation:

Parent: United Energy Resources, Inc. (parent)
Affiliates: PetroUnited, Inc. (Delaware)
PetroUnited Terminals, Inc.
United Energy Resources Overseas Finance N.V. (Netherlands, Antilles)

United Energy Services Company (Delaware)
J. W. Gibson Well Service Company (Delaware)
Mercury Drilling Company (Oklahoma)
United Gas Pipeline Company (Delaware)
Texas Offshore Pipeline System, Inc. (Delaware)
High Island Offshore System (Delaware)
Trans-Andarko Pipeline Company (Delaware)
United Alaska Fuels Corporation (Delaware)
United Mid-Continent Pipeline Company (Delaware)
Northern Border Pipeline Co. (Delaware)
United Offshore Company (Delaware)
Sea Robin Pipeline Company (Louisiana)
Unitex Offshore Transmission Company (Delaware)
U-T Offshore System (Delaware)
United Overseas Services, Inc. (Delaware)
UER AG (Canton of Zug, Switzerland)
United Texas Transmission Company (Texas)
United Texas South Plains, Inc. (Texas)
Palo Duro Pipeline Company (Texas)
Western Energy Transport Company (Delaware)

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v.

JAMES B. EDWARDS, Secretary of the United States Department of Energy, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioner Cotton Petroleum Corporation ("Cotton") prays that a writ of certiorari issue to review the decision of the Temporary Emergency Court of Appeals for the United States granting a writ of mandamus to vacate the judgment of the United States District Court for the Northern District of Oklahoma. The Court of Appeals held that predecisional, executive privilege may be validly invoked to bar discovery in civil litigation of relevant Department of Energy documents when it is asserted by agency trial counsel alone, without the consideration of the agency head and without an affidavit proving that the documents qualify for the privilege.

OPINION IN THE COURT BELOW

The opinion of the Temporary Emergency Court of Appeals of the United States is unreported to date and a copy is appended (App. 1a). The orders of the United States District Court for the Northern District of Oklahoma are also unreported and are reproduced in the appendices (App. 6a-48a).

JURISDICTION

The judgment and opinion of the Temporary Emergency Court of Appeals of the United States were entered September 3, 1981. A timely petition for rehearing and suggestion of rehearing *en banc* was denied October 21, 1981. On November 20, 1981, Chief Justice Warren E. Burger granted petitioner an extension of time for filing a petition for writ of certiorari until January 19, 1982. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note.

STATUTORY PROVISIONS

The issues presented here involve the Government's assertion of executive privilege to withhold potentially relevant documents which are otherwise discoverable in this civil litigation under Fed. R. Civ. P. 26. Moreover, the Due Process clause of the Fifth Amendment to the United States Constitution is also directly related to the questions presented in this case. Permitting Government trial counsel to withhold relevant, otherwise discoverable documents by invoking predecisional, executive privilege without providing any evidentiary support therefore raises serious Due

Process issues by depriving petitioner of any meaningful opportunity to test the Government's claims through the adversarial process.

STATEMENT OF THE CASE

This is an action to overturn a Remedial Order issued by the Department of Energy ("DOE") on August 26, 1977, ordering Cotton to repay $714,677.90 plus interest for alleged violations of the former Mandatory Petroleum Pricing Regulations. DOE has counterclaimed to enforce the Remedial Order and to recover civil penalties with respect to sales of crude oil by a secondary recovery unit operated by Cotton in Sheridan County, Montana (the North Goose Lake Unit) during the period November 1, 1973 through December 31, 1975. DOE contends that the 1973 price regulations compelled Cotton to compute its prices on the basis of unit-wide accounting rather than according to the lease-by-lease method prescribed by the unit agreement.

DOE based its Remedial Order on a 1975 "Ruling" by the agency (Ruling 1975-15) which had been adopted without notice and an opportunity for public comment on September 4, 1975. This Ruling announced for the first time that multiple oil producing properties operated as a secondary recovery "unit", are to be treated as a single "property" for purposes of computing the maximum lawful price under applicable regulations. Previous regulations did not even address the treatment of "units", much less require that all units be treated as a single "property". DOE has sought to apply this 1975 interpretation retroactively to November 1973 in order to force Cotton to recompute its price calculations. Under the applicable law,

a critical issue is whether Ruling 1975-15 was consistent with prior agency practice. Accordingly, in order to prove its claim, under established principles [*see, e.g., Standard Oil Company* v. *DOE,* 596 F.2d 1029, 1056 (Temp. Emer. Ct. App. 1978)] Cotton must have access to documents which reveal DOE's contemporaneous construction and application of the "property" concept to units.

DOE objected to all requested discovery on a variety of grounds. After an extended opportunity for briefing and argument, the District Court rejected each of DOE's objections, holding that the agency record was not complete, because the 1973 price regulation defining "property" was ambiguous and where DOE seeks to enforce, retrospectively, a later interpretation of such an ambiguous regulation, contemporaneous construction evidence is relevant and therefore discoverable. (App. 16a-17a). Accordingly, in its First Discovery Order (App. 6a), dated August 29, 1980, the District Court ordered that contemporaneous construction discovery proceed.

By its Second Discovery Order of November 18, 1980 (App. 23a), the District Court ordered DOE to search specific regional audit files for information relating to the challenged ruling. The Third Discovery Order of January 30, 1981 (App. 31a) rejected DOE's contention that there were only seven responsive audit reports and rejected DOE's interpretation limiting the scope of the Second Discovery Order to final audit reports dated May 1, 1973 to February 1, 1976.

On November 3, 1981, for the first time, DOE's trial counsel filed an unsupported claim of predecisional, executive privilege with respect to 47 documents. Simi-

lar unsupported claims were filed on December 15, 1981 and on January 12, 1981 with respect to 71 additional documents. DOE subsequently produced some of these documents, leaving 111 subject to the predecisional privilege claim. These claims offered the same "boiler plate" rationale for asserting executive privilege for each document:

> Release would hamper the intra-agency exchange of opinions and ideas and would have a "chilling effect" on the give and take involved in agency decisionmaking. It is in the public interest to insure that opinions and recommendations are expressed openly within the agency.

On January 15, 1981, Cotton sought to compel production of the withheld documents on the ground, *inter alia,* that the claim of executive privilege had been improperly asserted. By its January 21 brief, DOE again elected not to file any affidavit supporting its privilege claims and asserted, instead, that "a government attorney may assert executive privilege as to intra-agency deliberative materials." DOE January 21, Response at 7.

On January 23, the District Court held a 3½ hour conference on the pending discovery questions. By that time, the parties had conferred in an unsuccessful attempt to resolve the dispute as required by local Rule 14(d) and, accordingly, the Court then filed Cotton's January 15 request as a motion to compel. At that conference DOE reiterated its position that an affidavit of an agency official was legally unnecessary and that DOE had chosen not to file any affidavit so that it could test the issue. *See* Jan. 23, 1981 Tr. 109-110.

In view of this context, when DOE trial counsel asked—after three hours of conference—whether at

the eleventh hour he could change his litigation strategy and choose to submit an affidavit, the District Court properly stated that:

> I think the answer in essence is, if an affidavit is necessary, and that hasn't been filed here, and the Court concludes it is necessary, I think that is the government's problem because you have had ample opportunity to provide any supporting affidavits.

Jan. 23, 1981 Tr. 112. At DOE's request, the District Court allowed the parties until February 9 to "file supplemental legal memoranda further responding to the arguments previously advanced by each with respect to DOE's claims of privilege." (App. 35a).

Despite DOE's deliberate strategy to test the need for an affidavit, on February 12, DOE trial counsel filed a supplemental memorandum in which he changed his legal strategy with respect to the affidavit requirement and, for the first time, offered the affidavit of F. Scott Bush, Assistant Administrator for the Office of Regulatory Policy, Economic Regulatory Administration. On February 16, Cotton responded that the affidavit was "too little and too late" because: (1) the assertion of privilege by an "assistant administrator of a subagency of DOE" is legally insufficient; (2) the affidavit merely incorporated trial counsel's privilege claim verbatim, months after they had been formulated and filed by trial counsel; and (3) the affidavit was submitted long *after* DOE had responded to Cotton's detailed motion to compel and after DOE had advised the District Court that its chosen strategy in this case was not to file an affidavit so that it could contest the legal necessity for such an affidavit.

The Fourth Discovery Order of March 30, 1981 (App. 36a) again rejected DOE's attempt to withhold

discoverable documents, this time under claim of executive privilege. The District Court held that the requirements set forth in *United States* v. *Reynolds*, 345 U.S. 1 (1953), applied to DOE's claim of predecisional privilege and since they had not been fulfilled, the assertion of privilege was "both improper and untimely" and could not prevent production of the requested documents. On June 30, 1981, the District Court issued its Fifth Discovery Order (App. 43a), rejecting, after *in camera* inspection, DOE's work product privilege claims and declining to certify the executive privilege issue.

On July 15, 1981, DOE petitioned the Temporary Emergency Court of Appeals for a writ of mandamus and sought a stay of the District Court's Fourth and Fifth Discovery Orders. The Court of Appeals issued a stay and on September 1, 1981, without permitting Cotton to answer DOE's petition as required by Rule 21(b) of the Federal Rules of Appellate Procedure, granted the writ of mandamus.

In a three-page, *per curiam* opinion, the Court of Appeals held that the standards of *United States* v. *Reynolds* were totally inapposite to a claim of predecisional privilege and that accordingly: (1) "the [district] court erred in ruling that this privilege may be asserted only by the head of an agency;" and (2) "an affidavit or testimony from a responsible DOE official was unnecessary to assert the privilege effectively." (App. 2a). According to the Court of Appeals, executive privilege could be validly asserted by agency trial counsel without any evidentiary proof that the withheld documents qualified for the privilege. Thus, the Court of Appeals viewed the Bush affidavit as irrelevant.

On September 29, 1981, Cotton filed a petition for rehearing and suggestion for rehearing *en banc*. This petition was denied on October 21, 1981 and on November 20, 1981, Chief Justice Warren E. Burger granted Cotton's request for an extension of time within which to file a petition for writ of certiorari until January 19, 1982.

REASONS FOR GRANTING THE WRIT

The District Court rejected DOE trial counsel's claim of predecisional privilege for 111 documents because the privilege had not been asserted by the agency head following his personal consideration as required by *United States* v. *Reynolds,* 345 U.S. 1 (1953). On DOE's petition, and without allowing Cotton an opportunity to respond, the Temporary Emergency Court of Appeals issued a writ of mandamus vacating the District Court's Orders. The Court of Appeals ruled that where the agency will permit *in camera* inspection, this unique governmental privilege may be validly asserted by agency trial counsel alone, without the consideration of responsible, senior officials and without any affidavit to prove that the documents qualify for the privilege.

The three-page *per curiam* decision of the Temporary Emergency Court of Appeals rejects the standards announced by this Court in *United States* v. *Reynolds* as inapposite and in so doing conflicts with decisions of Courts of Appeals for the District of Columbia, the Third, the Fourth, the Fifth, the Eighth, the Ninth and the Tenth Circuits.

In addition to raising a conflict among the Circuits, however, the Temporary Emergency Court of Appeals' decision raises important and recurring questions of

Federal practice and procedure. Lawyers for DOE have withheld thousands of documents under claim of predecisional, executive privilege in many recent cases.[1] Other executive branch agencies have also increasingly asserted this privilege to avoid production of relevant documents.[2] Indeed, as the scope of ad-

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[1] *See, e.g.*, Coastal States Gas Corp. v. DOE, 617 F.2d 854, 858 (D.C. Cir. 1980); Mobil Oil Corp. v. DOE, 520 F. Supp. 414, 416 (N.D. N.Y. 1981); Pennzoil Co. v. DOE, C.A. No. 78-335 (D. Del. Jan. 29, 1981); Exxon Corp. v. DOE, 91 F.R.D. 26, 43 (N.D. Tex. 1981); Mobley v. DOE, Civ. No. 78-1073 (W.D. La. Dec. 15, 1980); United States v. Exxon Corp., 87 F.R.D. 624, 636 (D.D.C. 1980); The Coastal Corporation v. Duncan, 86 F.R.D. 514, 516 (D. Del. 1980); Tenneco Oil Co. v. DOE, 475 F. Supp. 299, 316 (D. Del. 1979); Amoco Production Co. v. DOE, 1 Energy Mngm't (CCH) ¶ 9752 at 9927 (D. Del. 1979); United States v. Getty Oil Co., 4 Energy Mngm't (CCH) ¶ 26,154 at 27,345 (C.D. Cal. 1979); Phillips Petroleum Co. v. DOE, 1 Energy Mngm't (CCH) ¶ 9740 at 9884 (D. Del. 1977).

[2] *See, e.g.*, Common Cause v. IRS, 646 F.2d 656 (D.C. Cir. 1981) (IRS); Taxation with Representation Fund v. IRS, 646 F.2d 666 (D.C. Cir. 1981) (IRS); Brinton v. Department of State, 636 F.2d 600 (D.C. Cir. 1980) (Department of State), *cert. denied*, 101 S. Ct. 3030 (1981); Parke, Davis & Co. v. Califano, 623 F.2d 1 (6th Cir. 1980) (FDA); Crooker v. Office of Pardon Attorney, 614 F.2d 825 (2d Cir. 1980) (Department of Justice); Hoover v. Department of Interior, 611 F.2d 1132 (5th Cir. 1980) (Department of Interior); Murphy v. Department of Army, 613 F.2d 1151 (D.C. Cir. 1979) (Army); Lead Industries Ass'n, Inc. v. OSHA, 610 F.2d 70 (2d Cir. 1979) (OSHA); McClelland v. Andrus, 606 F.2d 1278 (D.C. Cir. 1979) (Department of Interior); Pacific Molasses Co. v. NLRB Regional Office #15, 577 F.2d 1172 (5th Cir. 1978) (NLRB); Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242 (D.C. Cir. 1977) (Air Force); Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir. 1977) (Department of Health, Education and Welfare).

ministrative regulation has expanded in recent years, civil litigation between private parties and various regulatory agencies has increased significantly and the standards for asserting predecisional, executive privilege have become a recurrent problem.[3]

Moreover, the ruling at issue here dangerously undermines the integrity of this extraordinary privilege and unnecessarily disrupts the functions of Federal District Courts. By compelling the District Courts to undertake *in camera* inspection of voluminous documents, automatically, whenever agency trial counsel asserts the privilege—without consideration by the agency head and without an affidavit, the Court of Appeals' ruling fosters inconsistent, overbroad and unduly frequent claims of predecisional privilege and saddles Federal District Courts with cumbersome *in camera* document inspections in a factual vacuum.

1. The Decision of the Temporary Emergency Court of Appeals Improperly Rejects the Standards of *United States* v. *Reynolds*, 345 U.S. 1 (1953), and Conflicts with Decisions on the Same Matter by the Courts of Appeals for Seven Circuits.

The Temporary Emergency Court of Appeals based its decision on the conclusion that the standards for asserting executive privilege which this Court an-

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[3] *See, e.g.*, Comment, *Discovery in Litigation with Federal Agencies—Seeking Information in the Challenge of Interpretive Rules*, 28 Kan. L. Rev. 487 (1980); Note, *Preferential Treatment of the United States Under Federal Civil Discovery Procedures*, 13 Ga. L. Rev. 550 (1979); Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 141 (1976).

nounced in *United States* v. *Reynolds*, 345 U.S. 1 (1953), do not apply here:

> We conclude that the [trial] court erred in ruling that this privilege may be asserted only by the head of an agency. *United States* v. *Reynolds*, 345 U.S. 1 (1953), relied on by the district court, is inapposite. *Reynolds* dealt with an absolute privilege for state secrets, not the deliberate process privilege.

(App. 2a).

In *Reynolds*, the District Court sustained plaintiffs' motion to compel production of an Air Force accident investigation report over the Government's claim of executive privilege. The Court of Appeals affirmed and this Court reversed, holding that the privilege had been properly asserted by the Secretary of the Air Force and the affidavit of the Judge Advocate General. In so ruling, the Court enunciated the following standards:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. *There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.* The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

345 U.S. at 7-8 (footnotes omitted; emphasis added).

The decision of the Temporary Emergency Court of Appeals rejecting the *Reynolds* standards squarely conflicts with decisions of the Courts of Appeals for

the D.C. Circuit,[4] the Third Circuit,[5] the Fourth Circuit,[6] the Fifth Circuit,[7] the Eighth Circuit,[8] the Ninth Circuit[9] and the Tenth Circuit[10]—all of which have expressly held that:

> To assert executive privilege, for both state or military secrets and intra-governmental communications, the head of the agency involved must lodge a formal claim of privilege, after actual personal consideration of the documents in question. *United States* v. *Reynolds,* 345 U.S. at 7-8. . . .

Association for Women in Science v. *Califano,* 556 F.2d 339, 347 (D.C. Cir. 1977); *accord, Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 326-27 n.33 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena* v. *Clark,* 384 F.2d 979 (D.C. Cir.), *cert. denied,* 389 U.S. 952 (1967) ("While Reynolds involved military secrets, subsequent decisions have uniformly applied the guidelines expressed irrespective of the particular kind of executive claim advanced."); *Nixon* v. *Administrator of General Services,* 408 F. Supp. 321, 343 (D.D.C. 1976), *aff'd,* 433 U.S. 425

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[4] Association for Women In Science v. Califano, 566 F.2d 339, 347 (D.C. Cir. 1977).

[5] United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980).

[6] Ethyl Corporation v. EPA, 478 F.2d 47, 51 (4th Cir. 1973).

[7] Branch v. Phillips Petroleum Company, 638 F.2d 873, 882-83 (5th Cir. 1981); Carr v. Monroe Manufacturing Co., 431 F.2d 384, 387 (5th Cir. 1970), *cert. denied sub nom.* Aldridge v. Carr, 400 U.S. 1000 (1971).

[8] Mitchell v. Bass, 252 F.2d 513, 516 (8th Cir. 1958) (*dictum*).

[9] GSA v. Benson, 415 F.2d 878, 879 (9th Cir. 1969).

[10] United States v. Winner, 641 F.2d 825, 832-33 (10th Cir. 1981).

(1977), ("[I]n both cases involving a privilege shielding the executive from the need to disclose secret information and cases involving a privilege shielding the generalized interest in executive confidentiality, . . . only the head of the department involved, and not his subordinates, may invoke the privilege. *See, e.g., United States* v. *Reynolds,* 345 U.S. 1, 7-8. . . .").[11]

Indeed, the seven Circuit Courts of Appeals whose decisions conflict with that of the Temporary Emergency Court of Appeals in this case, constitute all of the Court of Appeals decisions on point. The First, Second, Sixth and Seventh Circuits have simply never had occasion to consider the application of the *Reynolds* standards beyond the area of military and state

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[11] *See also* Black v. Sheraton Corp. of America, 564 F.2d 531, 542-43 (D.C. Cir. 1977); Pennzoil Co. v. DOE, No. 78-335, (D. Del. June 30, 1980), slip op. at 1-2; Exxon Corp. v. DOE, No. 3-75-9836-W (N.D. Tex. June 9, 1980), slip op. at 2; The Coastal Corp. v. Duncan, 86 F.R.D. 514, 517 (D. Del. 1980); Crawford v. Dominic, 469 F. Supp. 260, 264 (E.D. Pa. 1979); Phillips Petroleum Co. v. DOE, 1 Energy Mngm't (CCH) ¶ 9740 at 9886 n.19 (D. Del. 1977); Jabara v. Kelley, 75 F.R.D. 475, 484 (E.D. Mich. 1977); Pierson v. United States, 428 F. Supp. 384, 393-396 (D. Del. 1977); Garber v. United States, 73 F.R.D. 364, 365 (D. D.C. 1976), *aff'd on the merits,* 578 F.2d 414 (D.C. Cir. 1978); A. O. Smith v. FTC, 403 F. Supp. 1000, 1016 (D. Del. 1975); Kinoy v. Mitchell, 67 F.R.D. 1, 11 (S.D.N.Y. 1975); Wood v. Breier, 54 F.R.D. 7, 11 n.14 (E.D. Wisc. 1972); Carter v. Carlson, 56 F.R.D. 9, 10 (D.D.C. 1972). Professor Wright agrees that "[t]he procedures announced by the Supreme Court in the Reynolds case to assert the state secrets privilege have been applied also to claims of executive privilege." 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2019 at 170 (1970); *see generally,* 8 J. WIGMORE, EVIDENCE § 2379 at 812 (McNaughton rev. 1961); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 108 at 230 (2d ed. 1972).

secrets. *See, e.g., Clift* v. *United States*, 597 F.2d 826 (2d Cir. 1979). Thus, all of the Courts of Appeals to consider the matter have agreed with the District Court here and disagreed with the Temporary Emergency Court of Appeals—*Reynolds* applies to the Government's claim of predecisional, executive privilege.

Moreover, there can be no question that the rationale behind the *Reynolds* decision remains applicable to predecisional privilege claims. In *Reynolds*, the Court sought some balance between the trial court's abdicating "[j]udicial control over the evidence in a case" to the "caprice of executive officers" and automatic *in camera* reviews by providing guidelines for properly asserting the privilege. The *Reynolds* approach—that "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer"—provides some assurance that executive privilege will not be lightly invoked while at the same time it reduces judicial interference with the confidentiality goals of the privilege (through *in camera* inspection) to a minimum.

So far as Cotton has been able to determine, no other court has ever permitted agency trial counsel alone to assert predecisional, executive privilege for the agency without affidavits. The Court of Appeals' abrupt departure from the standards imposed by *Reynolds* and its progeny is completely without foundation and deviates from the normal rules for evidentiary privileges.[12]

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[12] The Court of Appeals provides neither case law support nor policy rationale for its broad extension of the executive privilege

As with any evidentiary privilege, the burden is upon the party claiming executive privilege to demonstrate his qualification for exemption from disclosure.[13]

> The Federal Rules of Civil Procedure, to which the government is of course subject, clearly favors the disclosure of relevant material. Nondisclosure by virtue of privilege is the exception to the rule and the government carries the onus to convincingly demonstrate the necessity of withholding relevant material from its adversaries.

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claim. Citing *dictum* in Kerr v. United States District Court, 426 U.S. 394, 404-5 (1976), the Court of Appeals argues that this Court has cast doubt on the need for a "high ranking official" to assert executive privilege. This reliance on the *Kerr dictum* is misplaced. *Kerr* involved attempted discovery by convicted felons in the California penitentiary of the personnel files of their guards and fellow prisoners. The Court encouraged *in camera* inspection by the trial court "[i]n light of the potential seriousness" of the consequences of disclosure. 426 U.S. at 405. There is no indication that the Court thereby intended to overturn *Reynolds* or to fashion a new rule of law of general applicability.

[13] A. O. Smith v. F.T.C., 403 F. Supp. at 1016; United States v. Article of Drug, 43 F.R.D. 181, 190 (D. Del. 1967). *See generally* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2016 at 126 (1970). *See also* Herbert v. Lando, 441 U.S. 153, 175 (1979) (footnote omitted) ("Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances."); United States v. Nixon, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth."); Brennan v. Automatic Toll Systems, Inc., 60 F.R.D. 195, 196 (S.D. N.Y. 1973) ("A trial in the Federal Courts is not a sporting event but is a search for justice . . . [E]xecutive privilege is not to be used as a device whereby the government can 'have its cake and eat it too.' ").

SEC v. *National Student Marketing Corp.*, [1973-74 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,610 at 96,167 (D.D.C. 1974).

In the case of predecisional, executive privilege, the courts have uniformly recognized that the Government has the burden of *proving* that withheld documents qualify for the privilege. *Coastal States Gas Corp.* v. *DOE*, 617 F.2d 854, 868 (D.C. Cir. 1980); *Vaughn* v. *Rosen*, 523 F.2d 1136, 1145, 1146 (D.C. Cir. 1975) (*"Vaughn II"*); *Vaughn* v. *Rosen*, 484 F.2d 820, 825, (D.C. Cir. 1973); *("Vaughn I"), cert. denied*, 415 U.S. 877 (1974). Such proof can only be established by a "specific factual showing" that the documents qualify. *A. O. Smith* v. *FTC*, 403 F. Supp. 1000, 1016 (D. Del. 1975). This showing is customarily to be made "by means of *detailed affidavits or oral testimony*". *Vaughn I*, 484 F.2d at 826 n.20 (emphasis in original), quoting *EPA* v. *Mink*, 410 U.S. 73, 93 (1973).

"A close reading of cases where claims of executive privilege were raised indicates that the necessary facts have generally been required to be raised by affidavit." *A. O. Smith* v. *FTC*, 403 F. Supp. at 1016; *see also, United States* v. *O'Neill*, 619 F.2d 222, 226 (3d Cir. 1980). Absent an affidavit or other evidentiary proof, there is no evidence to support a privilege claim. Nothing in prior case law supports the Court of Appeals' conclusion that trial counsel's claims can substitute for detailed affidavits, following personal consideration, by the agency head simply because the agency says it will allow *in camera* inspection.[14]

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[14] The Court of Appeals cited *Vaughn I* for the proposition that affidavits are unnecessary unless the agency seeks to avoid *in camera* inspection. However, neither *Vaughn I* nor *Vaughn II*

Indeed, the procedure authorized by the Court of Appeals in the instant case has never been followed by the DOE in practice. For example, in *Pennzoil Company* v. *DOE,* No. 78-335 (D. Del. June 30, 1980), the agency asserted predecisional, executive privilege by means of an affidavit of an agency official. The same approach has been consistently followed by the agency in several other recent cases.[15] Thus, the Court of Appeals' decision not only departs from established case law, but also from the agency's consistent practice.

The inconsistency of the decision of the Temporary Emergency Court of Appeals with the decisions of the majority of the Circuit Courts and the unjustified departure of this decision from the *Reynolds* standards, from the established law relating to Governmental privileges and from this agency's practice, all demonstrate that the writ should issue.

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supports such a striking divergence from settled case law. Indeed, the *Vaughn I* footnote cited by the panel *per curiam* opinion refers to detailed affidavits as a means to satisfy the requirement for "*detailed justification*" from the agency. Nowhere does *Vaughn I* suggest that such affidavits are unnecessary if the Government offers *in camera* inspection. Moreover, in *Vaughn I* and *Vaughn II,* the court had before it an index *and a detailed affidavit* of the Director of the responsible agency. *Vaughn I,* 484 F.2d at 823; *Vaughn II,* 523 F.2d at 1144-46; see also Coastal States Gas Corp. v. DOE, 617 F.2d at 861 ["The parties have referred to (the index *and affidavits* of regional counsel) as the Government's Vaughn Index. . . ."].

[15] *See, e.g.,* Mobil Oil Corp. v. DOE, 520 F. Supp. 414, 418 (N.D. N.Y. 1981); Mobley v. DOE, CN No. 78-1073 (W.D.La. Dec. 15, 1980); Exxon Corp. v. DOE, C.A. 3-75-0836-W (N.D. Tex. June 9, 1980); The Coastal Corp. v. Duncan, 86 F.R.D. 514, 516 (D. Del. 1980).

2. The Standards for Invoking the Government's Unique "Predecisional", Executive Privilege Present Important And Recurring Issues in Federal Practice.

DOE lawyers have withheld potentially relevant documents from discovery in Federal Court litigation under claims of predecisional, executive privilege in a large number of recent cases. See note 1, *supra*. Moreover, other agencies have increasingly resorted to this same privilege in order to avoid production of otherwise discoverable documents. See note 2, *supra*.

This trend is likely to continue as administrative litigation in Federal Courts continues to increase.[16] Although Federal Court workload statistics are not detailed enough to isolate decisions involving discovery from Federal agencies, a significant increase in recent litigation over the Government's claims of predecisional privilege is apparent from the reported decisions.[17]

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[16] Direct administrative reviews in the United States Courts of Appeals "reached a record high of 3,800" in 1981, up from 2,564 in 1977. *1981 Annual Report of the Director, Administrative Office of the United States Courts* at 48, A-5 (1981). Administrative cases also represented a major portion of the 17,014 civil cases appealed from the District Courts in 1981. *Id.* at A-12. In addition, civil cases commenced in District Courts for the twelve months ended June 30, 1981 involved the United States, or its agencies, as a party in 34.2 percent of total filings, or 61,845 new cases, which represents a 94.6 percent increase from 1975. *Id.* at 63.

[17] A January 11, 1982 LEXIS search of the "newer" federal court decisions revealed 101 reported opinions discussing the application of the predecisional, executive privilege. Forty-five of these opinions were handed down since January 1, 1980.

3. The Decision of the Temporary Emergency Court of Appeals Allowing the Government To Withhold Relevant Documents From Discovery on the Basis of Agency Trial Counsel's Unsupported Claims of Executive Privilege, Dangerously Undermines the Integrity of This Unique Governmental Privilege.

Permitting agency trial counsel (rather than the agency head) to assert predecisional, executive privilege significantly increases the likelihood of inconsistent, overbroad and unduly frequent assertions of the privilege. By its very nature, the predecisional privilege can be abused easily, especially in view of the relatively subjective standard employed. The assessment of privilege claims includes determination of "whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *Coastal States Gas Corporation* v. *DOE,* 617 F.2d at 866.

Consistency in applying this relatively vague and subjective standard can only be assured by requiring that it be asserted by the agency head.

> It is of the greatest importance that the privilege be invoked only when policies it seeks to encourage are seriously threatened. Requiring the agency head to review the documents sought and to claim the privilege where appropriate is the most effective method available to assure consistency and prudence.

Pierson v. *United States,* 428 F. Supp. 384, 395 (D. Del. 1977). Although there is only one agency head, there may be literally hundreds of agency trial counsel—as there have been at DOE. If each trial counsel is allowed to interpret and apply the "predecisional" privilege test for himself, widespread inconsistency is virtually assured.

Moreover, an agency head who asserts executive privilege only after careful, personal consideration of the matter "is less likely to succumb to the temptation to abuse his authority to claim privilege." *Nixon* v. *Administrator of General Services,* 408 F. Supp. 321, 344 (D.D.C. 1976), *aff'd,* 433 U.S. 425 (1977). Such officials have greater visibility and political accountability than do agency staff counsel. In addition, restricting the assertion of the privilege to the agency head is consistent with this Court's admonition that it "is not to be lightly invoked." *United States* v. *Reynolds,* 345 U.S. at 7.

Abuse of the privilege is difficult for the courts to prevent—even with the availability of *in camera* inspection. But one abuse is inevitable under the Temporary Emergency Court of Appeals' decision: agency trial counsel, embroiled as an advocate in adversary proceedings, simply cannot be expected to provide the kind of objective and prudent consideration of the matter which all courts have demanded. An advocate's judgment on which documents should be precluded from discovery is too easily colored by his advocacy position. *Pierson* v. *United States,* 428 F. Supp. at 395.

Moreover, it is clear that: "The decision [whether to invoke executive privilege] involves policy, not simple law, and therefore is more than a Government lawyer's decision." *United States* v. *American Telephone & Telegraph Company,* 86 F.R.D. 603, 605 (D. D.C. 1979). The agency trial counsel's assertion of the privilege is not only incompetent, in a legal sense, but it impermissibly usurps what is essentially a policy-making decision. Any judicial rule which allows trial counsel to assert the privilege without consideration

by the agency head necessarily intrudes on the administrative discretion conferred on the agency head by law. Such a rule not only violates the statutory and executive prerogatives, but it may create unnecessary litigation.

Restricting invocation of the privilege to the agency head ensures that some measure of control and consistency will be included in privilege determinations. Upon personal inspection of suppressed documents, an agency head may decide that particular documents do not qualify for the privilege or that—for policy reasons—even apparently privileged documents should be produced in a particular case. The approach taken by the Court of Appeals in this case, in effect, elevates trial counsel to a policymaking level by allowing counsel to determine the agency's policy as to the requested disclosure simply as a matter of counsel's litigation strategy and without regard to broader issues.

Finally, allowing trial counsel to assert the privilege is bound to increase the frequency with which it is invoked. First, the solemnity occasioned by requiring the agency head to assert the privilege is both warranted and useful in reducing the undue frequency with which the privilege is claimed. Second, as the D.C. Circuit has repeatedly recognized, a process dependent on judicial *in camera* review inevitably fosters more frequent privilege claims:

> [T]here is an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information. Let the court decide!

Vaughn I, 484 F.2d at 826.

4. The Decision of the Temporary Emergency Court of Appeals Compelling Federal District Courts To Undertake *In Camera* Inspection Automatically, Whenever Government Trial Counsel Claims Executive Privilege, Unnecessarily Disrupts the Efficient Administration of the Federal Courts.

By requiring automatic *in camera* inspection to substitute for detailed evidentiary support from the agency head, the Court of Appeals not only ignores sound precedent, but also unnecessarily disrupts the efficient administration of the Federal Courts.

The established requirements for asserting and substantiating claims of executive privilege are more than mere formalities; they are designed by the courts to allow for the efficient resolution of such claims. As this Court has emphasized:

> Crucial to the decision [of predecisional privilege claims] is an understanding of the function of the documents in issue in the context of the administrative process which generated them.

NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). The Court of Appeals decision in the instant case guarantees that the Trial Courts will be forced to make difficult judgments on predecisional privilege claims without affidavits and thus *without the information "crucial to the decision."*

Without affidavits the Trial Court cannot determine the critical facts about each document—such as: (1) "whether it was generated *before* the adoption of an agency policy"; (2) "whether it reflects the give-and-take of the consultative process"; (3) "whether the document is so candid . . . that public disclosure is likely in the future to stifle . . . frank communication. . . ."; or (4) "whether the document is recommendatory in nature". *Coastal States Gas Corporation* v.

DOE, 617 F.2d at 866. Trial Courts simply cannot make "reasoned determinations" about the Government's privilege claims (*id.* at 861) absent the factual foundation necessary for judgment.

Privilege claims asserted without evidentiary support further handicap the Trial Courts by undermining the adversarial process. *In camera* inspection without detailed affidavits asserting the privilege necessarily deprives the party requesting production of the opportunity to review, criticize and attempt to rebut the Government's privilege rationale. Instead, the Trial Court is forced to make vital and complicated discovery decisions in a factual vacuum.

Moreover, automatic *in camera* inspection for all executive privilege claims virtually guarantees that such claims will proliferate and significantly increase the burdens on the Trial Courts.

> If the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore disclosable sections, and persuade the court that the entire mass is exempt. Thus, as a tactical matter, it is conceivable that an agency could gain an advantage by claiming overbroad exemptions.

Vaughn I, 484 F.2d at 826.

Ironically, the Court of Appeals' decision declines to require agency heads to read their own documents because of concern for the burden on agency officials. (App. 2a). Yet, without pause, the Court of Appeals readily throws that burden on Trial Courts, which are often unfamiliar with the practice and procedure of a particular agency, which are now to be deprived of any supporting factual affidavits for the job, and which have more important tasks to perform. Under the

Court of Appeals' approach, the time of agency officials is apparently deemed to be more valuable than that of Federal District Courts.

Finally, the Court of Appeals' decision makes *in camera* review virtually automatic. This result is not only burdensome on the Courts—especially in view of the prevalence of such privilege claims—but it is unnecessary. As this Court held in *EPA* v. *Mink*, 410 U.S. 73, 93 (1973):

> Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the decision of the Temporary Emergency Court of Appeals.

Respectfully submitted,

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January 19, 1982

Appendix

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-38

THE UNITED STATES DEPARTMENT OF ENERGY, Secretary of Energy, JAMES B. EDWARDS, and the UNITED STATES OF AMERICA, *Defendants-Petitioners,*

v.

HONORABLE THOMAS R. BRETT, Judge of the United States District Court for the Northern District of Oklahoma, *Respondent.*

(Judgment entered: September 1, 1981)

Before: GRANT, PECK and LACEY, Judges.

PER CURIAM.

The Department of Energy (DOE) petitions this Court for a writ of mandamus requiring the district court to vacate certain discovery orders in the case of *Cotton Petroleum Corp. v. DOE,* No. 79-C-217-B (N.D. Okla.), and to reconsider claims of evidentiary privilege raised by DOE.

In the action underlying this mandamus proceeding, DOE asserted the "deliberate process" privilege in over 100 documents which Cotton Petroleum sought to discover. In the fourth of a series of discovery orders (March 30, 1981), the district court rejected DOE's claim of privilege. In a fifth discovery order (June 30, 1981), the district court refused DOE's requests for a reconsideration and stay of the fourth order. (The fifth order also rejected certain claims of work-product privilege. That ruling is not challenged here.)

The district court's grounds for rejecting DOE's claim of the deliberative process privilege were that the claim was made by the wrong person, and too late. We conclude that the court erred in ruling that this privilege may be asserted only by the head of an agency. *United States v. Reynolds*, 345 U.S. 1 (1953), relied on by the district court, is inapposite. *Reynolds* dealt with an absolute privilege for state secrets, not the deliberate process privilege.

The requirements for properly asserting this latter privilege are set forth in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 977 (1974). *Vaughn* does not specifically require the filing of affidavits by any agency officials. Rather, affidavits or testimony are necessary under *Vaughn* only if the agency wishes to avoid *in camera* inspection of the documents by the trial court. *See* 484 F.2d at 826 n.20, citing *EPA v. Mink*, 410 U.S. 73, 93-94 (1973). *See also Crooker v. Office of Pardon Att'y*, 614 F.2d 825, 828 (2d Cir. 1980). In this case, the DOE is not only willing to submit the documents to an *in camera* inspection but, in fact, seeks such an inspection. Thus, an affidavit or testimony from a responsible DOE official was unnecessary to assert the privilege effectively.

Courts have in numerous cases required that governmental privileges be asserted by senior officials. *See, e.g., Crawford v. Dominic*, 469 F. Supp. 260, 264 (E.D. Pa. 1979), and cases cited there. In most cases, however, this procedural requirement reflects *Vaughn's* substantive requirement that the privilege be raised by individuals with specific and detailed knowledge of the documents in which the privilege is asserted. The Supreme Court, at least in dictum, has cast doubt on the advisability of *foreclosing* assertions of governmental privilege because the privilege was not claimed by a high ranking official. *See Kerr v. United States Dist. Ct.*, 426 U.S. 394, 404-5 (1976) (stressing possibility of reassertion of privilege on remand.) The rationale for the deliberate process privilege is its sup-

posed avoidance of chilling effects on decision making. That goal is not furthered and could in fact be hindered by a requirement that the privilege be asserted in all cases by agency heads.

In the present case, DOE offered a detailed and specific justification of its claims of privilege in its counsels' lengthy submissions of Nov. 3, 1980, Dec. 15, 1980, and Jan. 12, 1981. We hold that these documents met the relevant requirements of *Vaughn*. The submissions were timely, coming before Jan. 23, 1981, the date of the latest discovery hearing in the trial court. It is this date that the trial court itself considered the time limit for asserting evidentiary privileges.

For the reasons above, the writ of mandamus shall issue. The trial court is directed to vacate its fourth and fifth discovery orders, and to reconsider DOE's assertions of the deliberative process privilege.

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-38

THE UNITED STATES DEPARTMENT OF ENERGY,
JAMES B. EDWARDS, Secretary of Energy,
and the UNITED STATES OF AMERICA,
Defendants-Petitioners,

v.

THE HONORABLE THOMAS R. BRETT, United States District Judge for the Northern District of Oklahoma,
Respondent.

Before HONORABLE ROBERT A. GRANT, HONORABLE JOHN W. PECK, and HONORABLE FREDERICK B. LACEY, Judges.

This Petition for Writ of Mandamus was submitted on the Record from the United States District Court for the Northern District Of Oklahoma. Upon consideration thereof, the writ of mandamus shall issue. The trial court is directed to vacate its fourth and fifth discovery orders and to reconsider DOE's assertions of the deliberative process privilege.

FOR THE COURT:
/s/ RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

September 1, 1981

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-38

THE UNITED STATES DEPARTMENT OF ENERGY, Secretary of Energy, JAMES B. EDWARDS, and the UNITED STATES OF AMERICA, *Defendants-Petitioners,*

v.

THE HONORABLE THOMAS R. BRETT, Judge of the United States District Court for the Northern District of Oklahoma, *Respondent.*

Before HONORABLE ROBERT A. GRANT, HONORABLE JOHN W. PECK, and HONORABLE FREDERICK B. LACEY, Judges.

Upon consideration of Cotton Petroleum Corporation's Petition for Rehearing and Suggestion for Rehearing En Banc,

IT IS ORDERED that said Petition and Suggestion are DENIED. The mandate shall issue October 28, 1981.

FOR THE COURT:

Ruth H. Jacobson
Clerk

by: /s/ MICHAEL S. LEVINE
Michael S. Levine
Deputy Clerk

October 21, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 79-C-117-BT

COTTON PETROLEUM CORPORATION, a Delaware corporation, *Plaintiff*,

vs.

CHARLES DUNCAN, Secretary of Energy, and the UNITED STATES OF AMERICA, *Defendants*.

ORDER

(Filed August 29, 1980)

Cotton Petroleum Corporation ("Cotton") commenced this action seeking relief from a Remedial Order of the Department of Energy ("DOE") requiring it to rebate the sum of $714,677.90 plus interest and penalties and denial of "exception relief."[1] The Remedial Order grew out of the Energy Agency Ruling 1975-15 which said stripper wells could not be determined on a lease by lease basis when the property was being produced under a unitization order.

Cotton is a Tulsa, Oklahoma based oil producer and operates a unitized oil field [enhanced-recovery water floor unit] in Sheridan County, Montana called the North Goose Lake Unit ("NGLU"). The unit became operative on December 1, 1972, with enhanced recovery operations beginning in January of 1973. The unitization agreement made a single unit of the common reservoir and the various

[1] The case was initially pre-tried January 3, 1980, at which time the parties were directed to brief questions concerning the administrative record and discovery. Oral arguments on the pending discovery motions was had on May 29, 1980, and the parties were given additional time to submit authorities.

separate leases from which the property was previously produced.

To cope with the domestic oil-foreign oil price disparity the federal energy agency adopted regulations creating domestic "old" (lower tier), "new" (upper tier), and "stripper" oil price controls tied to dates and amount of production.

During the period of November 1, 1973 through December 31, 1975, it was provided in 6 CFR § 150.353 of the Cost of Living Council regulations and subsequently in 10 CFR § 212.73 of the FEA regulations that no producer would charge a price higher than the ceiling price for the first sale of domestic old crude oil. However, new and released crude petroleum could be sold without respect to the old oil ceiling price pursuant to 10 CFR § 212.74. From November 1, 1973 through December 31, 1975 Cotton computed the base production control level ("BPCL") for each lease in order to determine the total amount of new oil which was produced from the unit. Computation for stripper well exemption oil was similarly based on the amount of oil derived from each lease in the unit in order to obtain the higher per barrel price.

Property was first defined on August 17, 1973 [6 CFR § 150.354, carried over into 10 CFR § 212.72] as "the right which arises from a lease or from a fee interest to produce domestic crude oil." "Property" was also defined in the context of the stripper well exemption set forth in 10 CFR § 210.32 as "the right which arises from a lease in existence in 1972 and is coextensive with the term 'property' used in Section 212.72 for purposes of determining 'base production control level crude oil.' " Section 210.32 defined a "stripper well lease" as "A 'property' whose average daily production, including condensates, per well, did not exceed ten barrels per day."

On February 4, 1975, FEA issued Ruling 1975-15 which stated:

> "[i]n those cases where a property was unitized during 1972, comparison of like quantities requires a two-stage computation of BPCL to be done with reference to the 1972 production levels. For that portion of calendar year 1972 before unitization, the BPCL is equal to leases that now comprise the unit; for the remaining portion of calendar year 1972 after unitization, the BPCL is equal to the total production from the unit. . . .
>
> "In sum, in determining the BPCL for a particular property, the producer must look to the property as it existed in 1972 in order to establish the appropriate production levels."

Ruling 1975-15 required an oil producer to compute a single aggregate BPCL for a unitized property immediately upon the effective date of the property unitization. This was contrary to Cotton's lease by lease stripper well reporting.

In applying FEA Ruling 1975-15 retroactively to Cotton, DOE determined the following in its Remedial Order issued August 26, 1977:

1. Cotton's North Goose Lake Unit "never qualified as a stripper well property;" and

2. All crude oil production from Cotton's North Goose Lake Unit from November 1, 1973 through December 31, 1975 [except for new and released volume in December of 1973] was subject to the ceiling prices. (Adm. Rec. 19)

On promulgation of § 212.75 on February 1, 1976, Cotton conformed all production from North Goose Lake Unit with the unit property definition instead of reporting stripper production on an individual lease basis as it had previously done. (Adm. Rec. 3).

It is Cotton's position FEA Ruling 1975-15 is a basic departure from agency practice and interpretation; that

DOE acted arbitrarily, capriciously and in an inconsistent manner in interpreting and applying the "property" definition to a unitized operation. Cotton requests contemporaneous construction discovery in support of its position. Moreover, Cotton contends FEA Ruling 1975-15 was not promulgated pursuant to the rule-making procedures requiring notice and hearing.

DOE contends FEA Ruling 1975-15 is a mere "interpretation." DOE states FEA Ruling 1975-15 and the February 1, 1976 amendment were implicit in the 1973 "property" definition, 10 C.F.R. § 212.75.

DOE initially opposes discovery on the following theories:

(i) The Court is limited to a review of the administrative record.

(ii) Cotton waived its right to discovery as well as the issue of contemporaneous construction [agency authority] by failing to raise these matters at the administrative level.[2]

STANDARD OF REVIEW:

Cotton and DOE agree the juridical review in this case is governed by Section 211(d) of the Economic Stabilization Act[3] which provides:

> "[1] no regulation . . . shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of

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[2] Mr. Krogh, counsel for DOE, stated (TR-4):

> "As to the waiver point, we've also argued that Cotton waived the issue of this contemporaneous construction argument before the agency. In other words, there's a waiver of discovery, and there's an issue waiver."

[3] TR-5, lines 8 through 11.

> the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in [APA] Section 706(2) [which adds as a basis for setting aside a regulation, agency actions 'without observance of procedure required by law'] . . . and [2] no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order was in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence."

Under the standard of review of an administrative agency's decision, the reviewing court may only look to the administrative record to determine whether the record contains substantial evidence to support the result reached by the agency. *Tenneco Oil Company v. Department of Energy*, 4 CCH Energy Mgmt. ¶ 26,156 (Del. 1979). On the other hand, where an order is claimed to exceed the agency's authority, the court's inquiry is not limited to a review of an "administrative record", but such record may be supplemented. Here there is no issue of substantial evidence but Cotton does raise the issue of agency authority.

There is support that where an interpretation of an ambiguous administrative regulation is contested, the court should look to the contemporaneous construction which the responsible agency has given the regulation. *Standard Oil Co. v. Department of Energy*, 596 F2d 1029, 1055 (TECA); *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 413-14, 65 S.Ct. 1215, 80 L.Ed. 1700 (1945).

The weight to be given to an administrative interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control." *Standard Oil Co. v. Department of Energy, supra*, at 1056; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

In *Standard Oil Co. v. Department of Energy, supra,* at 1056, TECA found the rule of deference to the administrative agency ruling inapplicable because the FEA interpretation was after the fact and because the original regulations during the relevant time period were ambiguous. See also *United States v. Exxon Corporation,* Civil Action No. 78-1035 (USDC D. Col. August 6, 1980).

Since Cotton asserts the August 1973 "property" definition is ambiguous on its face[4], it seeks contemporaneous construction discovery on the issue of whether DOE, in excess of its authority, knowingly, arbitrarily and capriciously changed its own interpretation of an existing regulation.

WAIVER:

"A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission [administrative agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commission v. Aragon,* 329 U.S. 143, 155, 67 S.Ct. 245, 91 L.Ed. 136 (1946).

In *Hormel v. Helvering,* 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941), the Supreme Court held a rule requiring airing of issues at the administrative level is not an absolute or inflexible one. "There may always be exceptional cases or particular circumstances which will prompt

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[4] Mr. Howard, counsel for plaintiff, stated (TR-49, 50):

"When the original regulation is ambiguous on its face we claim, and we think the record clearly shows, that the original 1973 definition of 'property', which is all that existed until September 4, 1975, is plainly ambiguous on its face. That's a crucial finding, because once we find it's ambiguous then the established law of contemporaneous construction comes into play and we're entitled to some discovery . . . ."

a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed or passed upon by the court or administrative agency below."

The Court finds Cotton has not waived and comes within the exception contemplated by the Supreme Court in *Hormel v. Helvering, supra.*

The issues of discovery and contemporaneous construction [agency authority] present legal questions and do not depend on development of a factual record at the administrative level. *Asarco Inc. v. Environmental Protection Agcy.,* 578 F.2d 319 (USCA D. Col. 1978); *Weinberger v. Salfi,* 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

The administrative record does reveal Cotton raised the issue of the "ambiguity" of the "property" definition at the administrative level.[5] Cotton did not request or seek discovery in reference to the contemporaneous construction point. The Court finds, however, there is no "evidence that" Cotton "was husbanding this argument as an appeal point." *Tenneco Oil Company v. Department of Energy,* 4 CCH Energy Mgmt. ¶ 26,156 (Del. 1979). In *Tenneco, supra,* a constitutional question was presented.

Federal Courts do not require exhaustion of remedies when to attempt such exhaustion would obviously be futile. *Ogletree v. McNamara,* 449 F.2d 93, 99 (CCA D. Col. 1971); *Public Utilities Comm'n v. United States,* 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed. 2d 470 (1958); *Staub v. City of Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Thomas v. Collins,* 323 U. S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945); *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1964).

There was no provision for discovery at the administrative level during the relevant period. Effective January

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[5] Adm. Rec. 9

6, 1978, the administrative procedures regulations of DOE were amended. 43 Fed. Reg. 1930 et seq., now found in 10 CFR 205.190 et seq. 10 CFR 205.198 provides for discovery which ". . . . may be conducted only pursuant to an Order issued by the Office of Hearings and Appeals." This provision allowing discovery was promulgated after Cotton filed its objections. 10 CFR § 205.198(a) provides: "If a person intends to file a Motion for Discovery, he must file it at the same time he files his Statement of Objections or at the same time he files his Response to a Statement of Objections, whichever is earlier."

The Court has reviewed 43 Fed. Reg. 1930 et seq. At page 1931 under "Interim Requirements" it is stated: "The amendments will be adopted immediately by the FEA for purposes of further remedial order proceedings, ..." At page 1930, under "Amendments Adopted", reference is made to remedial orders issued after October 1, 1977. The record in this case reveals the Remedial Order was issued to Cotton August 26, 1977; hearing was had on December 9, 1977; and the Remedial Order was affirmed January 18, 1979. The new regulations permitting discovery was after the former two dates [effective January 6, 1978] and was prospective. Therefore, resort to the agency with a discovery request, either before or after January 6, 1978, by Cotton would most probably have been futile.

The Court finds, under the circumstances of this case, there is no waiver of discovery and no issue waiver as to contemporaneous construction. Discovery relative to contemporaneous construction is not dependent on the administrative record compiled before the Agency. It is the responsibility of the Court to carefully examine the reasons advanced by the agency to determine whether the actions of the agency were arbitrary, capricious and inconsistent in interpreting and applying the "property" definition to unit operations. The matter of discovery and the issue of contemporaneous construction [agency authority] are inextricably dependent.

RULING 1975-15 AND CONTEMPORANEOUS CONSTRUCTION DISCOVERY:

Grigsby v. Department of Energy, 585 F.2d 1069 (TECA 1978), relied on by DOE[*] is not dispositive of this matter.

In *Grigsby* there was no contention the regulation defining "property" was ambiguous. The challenge to Rule 1975-15 centered in whether the ruling explicated the rudimentary definition of "property" that appeared in the regulations. The argument propounded was that where unitization exists, Ruling 1975-15 expanded the definition of "right to produce" by extending the breadth of this right to multi-lease unit. *Grigsby*, page 1074. TECA concluded the regulation defining "property" suffered "from a severe case of unartful drafting" that it was necessary to "try to divine the intent of the drafters of the regulation" after analysis of the Ruling (1975-15). TECA determined Ruling 1975-15 was a "rational" interpretation of the definition of "property". In *Grigsby* TECA said: (P. 1084, footnote 1)

> ". . . We intimate no view on the validity of the promulgation of Ruling 1975-15, since the issue was raised for the first time on appeal."

Therefore, the ambiguity and agency contemporaneous construction question was not addressed.

In *Standard Oil Company v. Department of Energy*, 596 F.2d 1029 (TECA 1978) decided after *Grigsby*, TECA found "[W]hen an agency action has 'palpable effects' upon the regulated industry and the public in general, it is necessary to expose that action 'to the test of prior examination and comment by the affected parties'." Supra, at

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[*] DOE argues FEA Ruling 1975-15 does not change the meaning of the "property" definition, "which was authoritatively interpreted by TECA in *Grigsby* to mean exactly what the DOE says it meant in Ruling 1975-15. (TR 22, 23, 33).

1057. TECA further concluded that although the rule requiring allocation of product costs ahead of nonproduct costs was a reasonable interpretation of existing regulations, and did not exceed the FEA's statutory authority, the rule was neither compelled by existing regulations nor was it consistent with contemporaneous construction during the relevant period.

It was stated in *Standard Oil Company v. Department of Energy, supra,* at page 1064:

> "In Standard Oil II the court first quoted from Judge Jerome Frank's opinion in Tobin v. Edward S. Wagner Co., Inc., 187 F.2d 977 (2 Cir. 1951), where he said in part:
>
> > ". . . [I]t has often been recognized that, as a legislature cannot foresee all possible particular instances to which legislation is to apply, it must therefore be reasonably so interpreted to fill in gaps. But when the legislature delegates to an administrative official the authority, by 'sub-legislation', to issue regulations, in order to fill in those gaps, then the regulations, precisely because they particularize, ought not be as generously interpreted as the statute. In fairness to the regulated, the provisions of the regulations should not be deemed to include what the administrator, exercising his delegated power, might have covered but did not cover.' 453 F.Supp. at 239.
>
> "The Court in Standard Oil II determined that regardless of the FEA's intent, 'its regulations never communicated an all product cost first sequence of increased cost recovery rule to refiners during the January 1, 1975 through January 31, 1976 time frame, and this court will not cure that defect by parroting the strained post hoc 'interpretation' which the agency expressed for the first time on February 1, 1976.' 453 F.Supp. at 241."

In general a substantive or legislative rule has the force of law; an interpretative rule is merely a clarification of an existing statute or regulation. It is for the Court to determine into which category a rule falls. The label placed on the rule is not decisive; rather it is what the Agency does in fact. *Standard Oil Co. v. Department of Energy, supra,* at 1061.

In determining whether an agency ruling is substantive or interpretative the Court must look to the basic purpose of the statutory requirements of notice and comment. If the agency action had "palpable effects" upon the regulated industry, the action should have been exposed to the "test of prior examination and comment" before it is implemented. *Standard Oil Co. v. Department of Energy, supra; Nat. Helium Corp. v. Federal Energy Administration,* 569 F.2d 1137, 1146 (TECA 1978).

Recently, in the case of *United States v. Exxon Corporation,* Civ. A. No. 78-1035 (USDC DC August 6, 1980), the Court was faced with essentially the same question concerning contemporaneous construction discovery and Ruling 1975-15.[7] The Court stated at page 13 of its Memorandum dated August 6, 1980:

> "Accordingly, the court holds that when the DOE enforces, retrospectively, regulations that proscribe industry conduct unaddressed by prior regulations, contemporaneous construction evidence is relevant to the merits of the case, and, therefore, is discoverable."

Another way to state this same premise is: *When the DOE enforces, retrospectively, an interpretation of an*

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[7] In footnote 6 to the opinion at page 13 the Court said:
". . . This court intimates no opinion on the applicability of contemporaneous construction to a suit involving an industry plaintiff."

This Court can see no basis for the instant case to be distinguished from the *Exxon* case because there is an "industry plaintiff."

ambiguous regulation which has palpable effects on the industry, contemporaneous construction evidence is relevant to the merits of the case, and, is therefore discoverable.

Although DOE contends Grigsby is the final word as to the application of the "property" definition to a unitized lease, it admits the Grigsby interpretation does not preclude discovery but should limit the scope.[8]

There is ample authority to support the allowance of contemporaneous construction discovery. Progeny of *Standard Oil v. Department of Energy, supra,* have rejected the

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[8] At page 17 of the Transcript Mr. Krogh states:

". . . . And aside from Cotton's issue waiver and discovery waiver, the Department does not maintain that Cotton has no right to discovery of these contemporaneous—or of certain contemporaneous construction materials. The problem here is what is the scope of the term 'contemporaneous construction' and how great a burden can reasonably be placed on the Department to collect them? Relevance and burden have to be balanced, and we believe —."

At pages 33-34 of the Transcript Mr. Krogh states:

". . . . It seems to me that Grigsby does have to be taken into account in weighing relevance against burden and in applying the standard that you allow discovery to the extent that it may provide some aid in the interpretative task. And here, where the interpretation has already been done by TECA, much less discovery is justified, especially discovery which is too burdensome. In other words it's just something that tips the balance to weigh against any further contemporaneous discovery.

"Now, that's what we said in Penzoil [*Penzoil Company v. DOE,* Civ. A No. 78-335 (D.Del)], when we said Grigsby is not absolutely controlling. That doesn't mean that it should not be considered at all in ruling on these discovery issues . . . ."

arguments by DOE that the Court is confined to the administrative record.[9]

SCOPE OF CONTEMPORANEOUS CONSTRUCTION DISCOVERY:

A brief synopsis of the contemporaneous construction discovery allowed in other cases defines the scope and breadth of the discovery which should be allowed in the instant case.

In *Standard Oil Co. v. Department of Energy, supra,* 596 F.2d 1029, 1056, TECA said:

> ". . . We do conclude, however, that the statements by FEA auditors and other lower level officials are entitled to weight in determining the thoroughness of the FEA's consideration of its regulations, the validity of its reasoning, and its consistency with earlier and later pronouncements. . . ."

In *Amoco v. DOE, supra,* 1 CCH Energy Mgmt. ¶ 9752, Judge Stapleton held:

> "Thus, not only opinions and directives in manuals and the like, but also explicit indicators such as the

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[9] *Petrolane Inc. v. United States Dept. of Energy,* 79 F.R.D. 115 (USDC CD Calif. 1978)

Gulf Oil Corp. v. Schlesinger, 465 F.Supp. 913, (USDC ED Pa. 1979)

Getty v. DOE, 1 CCH Energy Mgmt. ¶ 9741 (D.Del. 1978)

Amoco v. DOE, 1 CCH Energy Mgmt. ¶ 9752 (D.Del. 1978)

Dorchester Gas Producing Co. v. DOE, Civ. A No. CA-3-75-0836-W (ND Tex. Oct. 24, 1978)

Tenneco v. DOE, 4 CCH Energy Mgmt. ¶ 26,156 (D.Del. 1979)

United States v. Exxon Corporation, Civ. A No. 78-1035 (USDC DC August 6, 1980)

Pennzoil Company v. DOE, Civ. A No. 78-335 (D. Del. June 9, 1980)

> practice of auditors and the reactions of administrators to knowledge of industry practice in applying the regulations have been considered.
>
> "Similar considerations apply to evidence reflecting the views of agency personnel who have participated in the development of the disputed regulation. . . ."

In *Petrolane Inc. v. United States, Dept. of Energy,* supra, 79 F.R.D. 115, 199, the Court held Petrolane was entitled to discover any materials needed to complete the administrative record and all materials relevant to the agency's contemporaneous construction of the rules, regulations and requirements during the pertinent time frame.

In *Tenneco v. DOE, supra,* 4 CCH Energy Mgmt. ¶ 26,156, the Court said:

> "As recognized by the court in Amoco, discovery relating to contemporaneous constructions need not be limited to 'statements made by the agency qua agency, to statements of 'high ranking officials', or to statements disseminated to the public." Slip op. at 8. The internal memoranda, directives, and guidelines generated and disseminated at a variety of levels are properly items of discovery. . . ."

In *United States v. Exxon, supra,* Civ. A. No. 78-1035 (August 6, 1980, DC), at page 15 of the Memorandum Opinion the Court held individual employee interpretations and comments were relevant to the merits of the case.

The Court is not persuaded by the arguments of DOE as to burden and relevance. The interrogatories propounded as well as the motion to produce are consistent with the discovery orders entered by Judge Stapleton in *Pennzoil Company v. DOE, supra,* Civ. A. No. 78-335, and Judge Flannery in *United States v. Exxon Corporation, supra.* Furthermore, the burden argument of DOE is now lacking in force because essentially the same information is being

produced in the *Pennzoil* case, *supra*, pursuant to the order of Judge Stapleton issued on June 9, 1980.

TIME FRAME:

The time frame for discovery sought by Cotton is from May 1, 1973 to February 1, 1976. The property definition was adopted for the first time by the Cost of Living Council in August, 1973. FEA Ruling 1975-15 was effective September 4, 1975. DOE did not formally amend the "property" definition until February 1, 1976.

On June 9, 1980, Judge Stapleton entered a final Order in *Pennzoil Company v. DOE, supra,* Civil A. No. 78-335 (USDC Del.) defining the period to be covered by discovery as May 1, 1973 to September 4, 1975.

In *United States v. Exxon, supra,* Civ. A. No. 78-1035 (DC Aug. 6, 1980), Judge Flannery adopted a discovery cut-off date of September 1, 1976 [based on the fact DOE released its definition of significant alteration on September 1, 1976].

This Court, in determining the period to be encompassed in discovery finds the rationale of Judge Flannery persuasive in that the formal amendment of the property definition did not occur until February 1, 1976. Therefore, the time period from May 1, 1973 through February 1, 1976, seems reasonable.

PRIVILEGE:

Privilege can be broken down into three categories, i.e., Attorney-Client Privilege; Work-Product Privilege; and "Deliberative Process" Privilege.

This Order is not to be construed as a waiver of privilege by DOE.

The Court finds, as to the claim of any privilege raised by DOE, DOE should follow the criteria in *Vaughn v.*

Rosen, 484 F.2d 820, 827 (DC Cir. 1973), cert. denied 415 U.S. 877 (1974). Concerning the Vaughn Index, the DOE should pay particular attention to *Coastal States Gas Corporation v. Department of Energy,* —— F2d ——, No. 79-2181 (D.C. Cir. Feb. 15, 1980).

OBJECTIONS TO PLAINTIFF'S INTERROGATORIES:

IT IS ORDERED as follows:

1. The general objections of DOE to the Plaintiff's Interrogatories are overruled.

2. The Objection to Interrogatory Number 2 is overruled.

3. The Objection to Interrogatory Number 3 is sustained.

4. The Objection to Interrogatory Number 4 is overruled.

5. The Objections to Interrogatories Numbers 5 and 6 are overruled.

6. The Objection to Interrogatory Number 20 is overruled.

7. The Objection to Interrogatory Number 21 is overruled.

8. The Objection to Interrogatory Number 23 is sustained in part but is overruled in reference to documents and communications in conjunction with the conduct of the audit bearing on the applicability of the "property" definition in 10 C.F.R. 212.72 and/or FEA Ruling 1975-15 to unitized operations.

9. The Objection to Interrogatory Number 24 is sustained in part but is overruled in reference to documents and communications in conjunction with the conduct of the audit bearing on the applicability of the "property" definition in 10 C.F.R. 212.72 and/or FEA Ruling 1975-15 to unitized operations.

GENERAL ORDER:

The parties are directed to consult with each other and present to the Court an agreed Discovery Order consistent with this Memorandum on or before October 1, 1980. (The agreed order should detail scope and time limitations.)

If the parties cannot agree to a Discovery Order concerning interrogatory answers and Motion to Produce within the time specified by the Court, upon written notification by either party, the Court will prepare and enter an Order.

ENTERED this 29th day of August, 1980.

/s/ THOMAS R. BRETT
Thomas R. Brett
United States District Judge
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 79-C-217-B

COTTON PETROLEUM CORPORATION, a Delaware corporation, *Plaintiff*,

v.

CHARLES DUNCAN, Secretary of Energy, and the UNITED STATES OF AMERICA, *Defendants*.

SECOND DISCOVERY ORDER

(Filed November 18, 1980)

By Order of August 29, 1980, the Court decided several pending discovery issues and ordered the parties to consult with each other and present to the Court an agreed upon Discovery Order, consistent with the Court's August 29 Order, on or before October 1, 1980. The parties subsequently informed the Court that they had consulted with each other and had reached tentative agreement as to a number of items, but were unable to reach an agreement as to the discovery of documents in defendants' so-called "audit files." The Court scheduled a conference on these questions and heard extensive oral argument on October 9, 1980. The Court having heard oral argument by the parties and reviewed memoranda submitted by the parties, it is this 18th day of November, 1980, ORDERED:

I. On or before November 28, 1980, defendants will identify all documents generated during the period May 1, 1973 to February 1, 1976, which interpret or construe the regulatory definitions contained in 10 C.F.R. § 212.72 (formerly contained in 6 C.F.R. § 150.354(b)) and/or 10 C.F.R. § 212.75 and/or the action denominated as "Ruling 1975-15", as those Regulations and/or Ruling relate to the case

of a property that was unitized before, during or after calendar year 1972.

Defendants' burden to identify the aforesaid documents shall be discharged if—

(i) Defendants identify all such documents, from whatever source, of which defendants' counsel have actual knowledge and all such documents which defendants are able to identify as a result of a regional and national headquarters search already conducted in connection with *Pennzoil Company v. DOE*, Civil Action No. 78-335 (D.Del.; Stapleton, J.); and

(ii) Defendants search the files of the following named individuals, and identify such documents resulting from said search:

Rendel B. Alldredge
Peter Antonelli
C. Thomas Bianconi
George V. Biondi
Maurice C. Boehl
Bruce D. Boss
Linda Buck
Michael F. Butler
Harold Butz
William D. Carson
Richard P. Chandler
Bert Concklin
Carl A. Corrallo
Andrew Drance
Jim Dvorin
Philip Essley
Jim Finsterle
Melvin Goldstein
John Harper
Donald Hess
John A. Hill
Everard A. Marseglia, Jr.
Craig McClellan
Tim McNamar
Robert Montgomery
Eugene Nowicki
Charles R. Owens
Michael Paige
Dino Pappas
Henry Puppa
Daniel Rathbun
J. Lisle Reed
Otto Reid
Mary Jane Reynolds
Douglas C. Robinson
John Sawhill
Mark N. Silverman
William E. Simon
Gorman C. Smith
Jack Snipes
Fred Stuckwisch
John A. Vernon

Bart A. Holiday
William A. Johnson
Avron Landesman
James C. Landgon, Jr.
Jay F. Lapin
Duke R. Ligon
Peter Luedtke
Edwin M. Mampe
Ivan Maple
Judith Mariassay
Ottie Vipperman
William A. Walker
Mike Ware
John W. Weber
Harold Weisman
Paul Williams
David G. Wilson
Frank G. Zarb
Eric Zausner

(iii) Except where defendants' counsel reasonably believes that a search is not likely to turn up such documents (and identifies such offices or files not searched with a brief explanation of the basis for such belief), and except for the personal files of employees other than those listed in Paragraph (ii) above, defendants search the following offices; and identify such documents resulting from said search:

(a) Office of Hearings and Appeals ("OHA") (except publicly available case records and decisions)

(b) Economic Regulatory Administration:

Administrator
Deputy Administrator(s)
Counsel to the Administrator

Office of Enforcement:

Assistant Administrator for Enforcement
Deputy Assistant Administrator
Enforcement Policy and Planning Division
Program Operations Division
Program Manager for Crude Producers
Director of Regional Compliance for Regions I-X

Office of Special Counsel:

Special Counsel
Deputy Special Counsel

Office of Solicitor
Office of Management and Industrial Analysis
Office of Technology and Computer Science
Office of Audit Program Operations
Office of Audit Planning and Systems Integration
Office of Field Operations

Office of Regulations and Emergency Planning:

Assistant Administrator
Deputy Assistant Administrator
Petroleum Pricing Division

Office of Fuels Regulations:

Assistant Administrator
Deputy Assistant Administrator
Crude Oil Supply and Allocation

Office of Operations, Planning and Evaluation

(c) Office of General Counsel:

General Counsel
Deputy General Counsel for Enforcement and Litigation
Deputy General Counsel for Regulations
Assistant General Counsel for Petroleum Regulations
Assistant General Counsel for Interpretations and Rulings
Assistant General Counsel for Administrative Litigation
Assistant General Counsel for Regulatory Litigation I
Assistant General Counsel for Regulatory Litigation II
Assistant General Counsel for Enforcement
Director of Special Investigations
Regional Counsel for Regions I-X

All Roman Numeral "I" documents identified by defendants, as to which privilege is not claimed, shall be produced on November 26, 1980 at the offices of Davis, Graham & Stubbs, Washington, D.C.; *provided, however,* that: (i) all Roman Numeral "I" documents identified by defendants from its search of the files of Messrs. C. Thomas Bianconi, Bruce D. Boss, Richard P. Chandler, Eugene Nowicki and Paul Williams and all Roman Numeral "I" documents identified for the period September 4, 1975 through February 1, 1976 shall be produced on November 28, 1980, to the maximum extent possible, and in no event later than December 15, 1980; (ii) all Roman Numeral "I" documents identified from the search of the subject matter, correspondence, reading and chronological files of the Regional Counsels and Directors of Regional Compliance for Regions I through X shall be produced on December 15, 1980; and (iii) all Roman Numeral "I" documents identified from the search of the case specific law enforcement files of the Regional Counsels and Directors of Regional Compliance for Regions I through X shall be produced as soon as possible after December 15, 1980.

II. (i) "Identify all documents" means to state each of the following: (a) the full name of the author(s) or person(s) by whom the document was written, prepared, recorded, or made (and signed, if different); (b) the date of the document; (c) the type of document (*e.g.,* letter, memoranda, transcript); (d) the title of the document; (e) the full name of each person by whom a copy or duplicate original of the document was sent, given, or provided by the issuing and/or receiving individual, organization, or entity, or an agent or employee thereof, and, where applicable, the full name and address of the addressee of the document, unless the document was distributed to members of a large class, in which case it shall be sufficient to identify the class rather than the individual members.

To the extent any of the above information does not appear on the document itself, defendants shall make reasonable inquiries to ascertain this information, and identify the file and office in which the document was contained when located in the course of defendants' search. In the event that any responsive document was but is no longer in your possession, custody or control, state what disposition was made of it and when.

The final version and each draft of each document should be identified separately. Each original and each non-identical copy (bearing marks or notations not found on the original) of each final version and draft of each document should be identified separately.

(ii) "Documents" is used in the broadest sense of the word, and includes but is not limited to: (a) all writings of any kind, including all memoranda (whether internal or external), guidelines, reports, notes of meetings or conversations (whether by telephone or otherwise), studies, legal opinions, interpretations, directives, position papers, files, file jackets, bulletin charts, computer data, guides, publications, instructions, handbooks, manuals, operating procedures, appointment calendars, call slips, training materials, notes, minutes, letters and other correspondence, testimony, press releases, speeches, summaries or abstracts, surveys, graphs, statistical abstracts, engineering reports, tables, printed or typewritten form (whether of visits, telephone calls, or otherwise), indices, and the like, and all drafts of any of the foregoing; and (b) all mechanical magnetic or electronic recordings, photographs, microfilms, and any other data compilation from which information can be obtained, and transcripts of any of the foregoing.

(iii) Documents which "interpret or construe" include those which supply analysis, criticism, or explanation of the cited Regulations or Ruling, as well as those which apply the cited Regulations or the Ruling (either as proposed or as adopted) in a specific factual context.

(iv) "Search the files of . . . named individuals" shall include the search of personal or office files maintained by or for such persons.

(v) "Search the files at or of . . . offices . . ." shall include files which were held or maintained by defendants or by predecessor or successor offices exercising one or more of the functions of the identified office and which are currently in the possession of the defendants.

III. In addition to the document production and in accordance with the Court's August 29, 1980 Order in this action, no later than November 28, 1980, defendants shall: (a) answer and produce documents requested in connection with Cotton's First Set of Interrogatories Numbers 2, 20 and 21; and (b) answer and produce documents requested in connection with Cotton's First Set of Interrogatories Numbers 23 and 24 in reference to documents and communications in conjunction with the conduct of the audit of Cotton pending on the applicability of the "property" definition in 10 C.F.R. 212.75 and/or FEA Ruling 1975-15 to unitized operations.

The Court has overruled defendants' objections to plaintiff's First Set of Interrogatories Numbers 4, 5 and 6 and associated document requests, however, the parties have agreed that responses to those interrogatories and document requests will be undertaken as part of the overall phased discovery program set forth in this and any subsequent discovery orders. (The Court understands the parties have agreed concerning the documents requested in Paragraphs I and III herein, excluding any properly privileged documents.)

IV. (i) The defendants shall search the Region VI audit files for the final audit reports or comparable documents with respect to the audits of the independent crude oil producers which were targeted for audit either by the Agency's Washington or Regional offices under defendants' so-called "Project Manipulator."

(ii) Defendants shall identify and produce said final audit reports and attachments, or comparable documents, for said audits instituted and involving the period from May 1, 1973 through February 1, 1976. Said audit report information to be produced shall contain all references, directly or indirectly, applying or interpreting Rule 1975-15 relating to stripper well production and unitized leases.[1]

V. Neither this Discovery Order, nor the Court's August 29 Order is to be construed as a waiver of privilege by the plaintiff or defendant. As the Court's August 29 Order requires, as to any claim of privilege raised by defendants, defendants shall follow the criteria set forth in *Vaughn v. Rosen,* 484 F.2d 820, 827 (D.C.Cir. 1973), *cert. denied,* 415 U.S. 877 (1974). Defendants shall also pay particular attention to *Coastal States Gas Corporation v. Department of Energy,* 617 F.2d 854 (D.C. Cir. Feb. 15, 1980).

VI. All documents identified by defendants, as to which privilege is not claimed, shall be produced on November 28, 1980, as for Roman Numeral "I", and January 12, 1981, as to Roman Numeral IV, at the offices of Davis, Graham & Stubbs, Washington, D.C.

/s/ THOMAS R. BRETT
Thomas R. Brett
United States District Judge
Northern District of Oklahoma
11-18-80

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[1] In *United States v. Exxon Corp.*, CA No. 78-1035 (D.D.C. Oct. 9, 1980), Judge Flannery held DOE need not search the audit files of independent producers like Cotton, and limited the search to the final audit reports from audit files for the 34 major producers like Exxon. This plaintiff [Cotton] is not one of the 34 major producers and the more relevant audit reports information to this plaintiff would be audit reports of independent crude oil producers as is Cotton.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 79-C-217-B

COTTON PETROLEUM CORPORATION, a Delaware corporation, *Plaintiff*,

v.

CHARLES DUNCAN, Secretary of Energy, and the UNITED STATES OF AMERICA, *Defendants*.

THIRD DISCOVERY ORDER

(Filed January 30, 1981)

By Memorandum Opinion and Order of August 29, 1980, (4 CCH Energy Mgmt. ¶ 26,250) this Court determined that the plaintiff, Cotton Petroleum Corporation ("Cotton"), was entitled to obtain so-called "contemporaneous construction" discovery from the defendants, Secretary of Energy and United States (hereinafter "DOE"). Following that Order, the parties were able to agree on the scope of much of the discovery, but could not agree on discovery of statements by FEA or DOE auditors in DOE audit reports. Following additional briefing and argument, this Court entered its Second Discovery Order on November 18, 1980. This Second Discovery Order incorporated discovery requirements already agreed upon by the parties and also directed DOE to search its Region VI audit files for its so-called "Project Manipulator" audits and to identify and produce the final audit reports and attachments, or comparable documents, for any such audits instituted during the period from May 1, 1973 through February 1, 1976.

The Second Discovery Order set forth a phased production schedule with documents to be produced on Novem-

ber 28, December 15 and January 12. Production of certain other documents was not scheduled for a specified date other than "as soon as possible after December 15, 1980." By January 12, 1981, DOE had produced approximately 900 documents, or portions thereof, and withheld 117 documents, or portions thereof, under claims of privilege. On January 28, 1981, however, DOE withdrew its claims of privilege with respect to five of these documents (DOE documents F-G, J-K and O), leaving 112 documents which have been withheld under claims of privilege. All 112 of these documents were withheld under claims of executive (or pre-decisional) privilege. Several documents are also withheld under claim of investigatory privilege and one document (L) is withheld under claim of attorney-client privilege.

On January 15, 1981 the plaintiff filed a seven page letter to the Court, together with attachments, opposing all of these privilege claims and, in lieu of a formal motion to compel, requesting a discovery conference to review the matter. The Court scheduled a conference for January 23, 1981. At the January 23 conference, the defendants filed a nine page letter, together with attachments, responding to plaintiff's opposition to their privilege claims. Also at the January 23 conference, the Court heard over 3½ hours of argument and discussion about the documents withheld, the adequacy of defendant's search of Region VI audit files, the propriety of defendants' assertion of privilege, the need or lack thereof for proof that the documents qualify for the claimed privileges, the merits of the privilege claims and the need or lack thereof for production.

For purposes of discussion, the parties categorized the withheld documents into four groups as follows:

Group I: Consists of Region VI "project manipulator" final audit reports. DOE has identified eleven documents relating to seven separate "Project Manipulator" audit reports and has withheld under claim of pre-decisional

privilege (DOE Privilege Claim numbers 97-103) portions of all seven audit reports. Cotton maintains as to Group I that (1) DOE has conducted an inadequate search of the Region VI Project Manipulator audit reports because there must be more than seven reports responsive to the Court's Second Discovery Order and (2) that the privilege claim is invalid.

Group II: Consists of 61 DOE National office and Regional office documents which were not subject to discovery orders in the other unit property cases (*Pennzoil v. DOE; DOE v. Exxon*). DOE has withheld all or portions of all 61 documents (DOE privilege claims numbered 35-96) on grounds of pre-decisional privilege, 13 have additionally been withheld or claims of work-product privilege and 1 (consisting of the name of an informant) has been withheld on claim of investigatory privilege. Cotton seeks to compel discovery of all of these documents withheld on the basis of pre-decisional or work product privilege, but does not seek discovery of the informant's name.

Group III: Consists of 34 DOE National office documents which have been withheld (DOE privilege claims numbered 1-31) entirely on grounds of pre-decisional privilege. Of these 34 documents, DOE has subsequently produced 1 document (#32) to Cotton and withdrawn its privilege claim. These same 33 documents and privilege claims are at issue in the *Pennzoil* case now pending before Judge Stapleton in the United States District Court for the District of Delaware.

Group IV: Consists of 10 DOE documents relating to DOE's audit of Cotton. Of 15 documents originally withheld in this group, on January 28, 1981, DOE produced 5 to Cotton. Thus, DOE has withheld all or portions of these documents (A-E, H, I, L-N), primarily on the claim of pre-decisional privilege (DOE documents A-E, H-I, M-N), but also on claims of work product privilege (DOE documents D, H-J, L-N), attorney-client privilege (DOE

document) and investigative privilege (DOE document M). Cotton seeks to compel discovery of all Group III and IV documents as well.

Following the extended conference on January 23 at which Cotton moved to compel discovery of the withheld documents, and separate discussions among the parties, DOE and Cotton agreed that DOE would conduct a supplemental search of its Region VI "Project Manipulator" audit reports on or before February 20, 1981, and Cotton urged the Court to proceed without further delay to decide the pending privilege claim issues without waiting for this additional search to be completed and DOE stated that the Court could resolve these issues now (except with respect to the "need" argument), since any further privilege claims made at that time would be of the same character as those presently asserted.

Considering all of the foregoing, it is this _____ day of February, 1981, ORDERED;

1. On or before February 20, 1981, DOE shall:

   (a) Provide Cotton and the Court with a complete list identifying all producers which were targeted for audit under DOE's "Project Manipulator" by DOE Region VI; this list should include all of the 235 targeted producers which had been assigned to Region VI for audit, whether directed by the DOE National office or by a DOE Regional office.

   (b) Counsel for DOE, Mr. Daniel Shea, shall personally inspect the audit reports for all Region VI audits identified pursuant to paragraph 1(a) and based on his personal inspection, shall identify and produce all such final audit reports and attachments, or comparable documents, for such audits (i) which were instituted during the period

May 1, 1973 through February 1, 1976, whether or not the date of the audit report falls within this period, and (ii) which directly or indirectly involve a crude oil unit or apply or interpret Ruling 1975-15 or the August, 1973 regulations with respect to the determination of "new" and "old" oil or stripper well qualification for unitized operations.

2. Cotton and DOE may file supplemental legal memoranda further responding to the arguments previously advanced by each with respect to DOE's claims of privilege. By agreement of the parties, these supplements may be filed on or before February 9, 1981. All parties are invited to keep the Court apprised of any relevant judicial decisions which may arise during the Court's consideration of these matters.

3. This Order is not to be construed as a waiver of any privilege by defendant or plaintiff.

/s/ THOMAS R. BRETT
Thomas R. Brett
United States District Judge
Northern District of Oklahoma

1-30-81

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 79-C-217-B

COTTON PETROLEUM CORPORATION, a Delaware corporation, *Plaintiff*,

vs.

CHARLES DUNCAN, Secretary of Energy, and the UNITED STATES OF AMERICA, *Defendants*.

FOURTH DISCOVERY ORDER

(Filed March 30, 1981)

By letter dated January 15, 1981, Cotton Petroleum Corporation (Cotton) advised the Court that in its opinion the Department of Energy (DOE) had failed to comply with the Court's outstanding discovery orders and with established discovery law. By letter dated January 21, 1981, DOE responded. The Court set the matter for a discovery conference on January 23, 1981. Cotton's January 15, 1981 letter was filed on January 23, 1981 as a Motion to Compel and DOE's January 21, 1981 letter was filed as a Response to the Motion to Compel. After extensive oral argument on January 23, 1981, the Court took the matter under advisement and directed the parties to file supplemental briefs on or before February 2, 1981.

One hundred eleven documents are presently in dispute, and DOE claims pre-decisional (executive) privilege as to all one hundred eleven documents. Additionally, several documents are withheld under claims of work product privilege and investigatory privilege. The withheld documents are categorized into four groups as follows:

GROUP ONE:

Region VI "project manipulator" final audit reports. DOE has identified eleven documents relating to seven "Project Manipulator" audit reports and withheld them under claim of pre-decisional privilege. (DOE Privilege Claims number 97-103)

GROUP TWO:

Sixty-one DOE National office and Regional office documents which were not subject to discovery orders in other ruling 1975-15 unit property cases (*Pennzoil v. DOE*, United States District Court for the District of Delaware, Civil Action No. 78-335, unpublished memorandum opinion of Judge Walter K. Stapleton; *DOE v. Exxon*, United States District Court for the Northern District of Texas, Civil Action No. CA3-75-9836-W, unpublished Order of Judge Halbert O. Woodward of June 9, 1980). DOE has withheld all or portions of all 61 documents asserting pre-decisional privilege. (DOE Privilege Claims numbers 35-96) Additionally, 13 documents have been withheld on claims of work-product privilege and 1 (consisting of the name of an informant) has been withheld on the claim of investigatory privilege.[1]

GROUP THREE:

Thirty-four DOE National Office documents have been withheld entirely on grounds of pre-decisional privilege (DOE Privilege Claims numbers 1-31). Of these 34 documents, DOE has subsequently produced 1 document (#32) to Cotton and withdrawn its privilege claim. These same 33 documents and privilege claims were at issue in the *Pennzoil Company v. DOE* case pending before Judge

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[1] Cotton does not seek discovery of the informant's name. (See Third Discovery Order, filed January 30, 1981, page 3).

Stapleton in the United States District Court for the District of Delaware.[2]

GROUP FOUR:

Nine DOE documents relating to DOE's audit of Cotton. Of 15 documents originally withheld in this group, on January 28, 1981, DOE produced 5 to Cotton. In its Further Statement Concerning Privilege Claims filed February 13, 1981, footnote 1, page 1, DOE withdrew all claims of attorney-client privilege (Privilege Claim L). Thus, DOE has withheld all or portions of these documents (A-E, H, I, M, N); claiming pre-decisional privilege (DOE documents A-E, H-I, M, N), work product privilege (DOE documents D, H-J, M, N) and investigative privilege (DOE document M).

PRE-DECISIONAL OR EXECUTIVE PRIVILEGE AND INVESTIGATORY PRIVILEGE:

DOE claims pre-decisional or executive privilege as follows: Group One—claims numbers 97-103; Group Two—claims numbers 35-96; Group Three—claims numbers 1-31; and Group Four—Documents A-E, H, I, M, N; and investigatory privilege as to Document M.

The pre-decisional or executive privilege was first asserted by DOE's trial counsel. At the hearing on January 23, 1981 DOE's trial counsel asked the Court whether DOE

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[2] On January 29, 1981, in *Pennzoil Company v. DOE*, Civil Action No. 78-335, United States District Court for the District of Delaware, Judge Stapleton found executive privilege had been properly invoked by Hazel Rollins, Administrator for the relevant agency. Judge Stapleton further found the contested documents did fall within the scope of the asserted privilege, holding the documents did not become "post-decisional" by the DOE position the "property" definition contained in 10 C.F.R. § 212.72 meant from its inception what Ruling 1975-15 later said that it meant.

could later file a supporting agency affidavit if the Court determined an appropriate affidavit was necessary to assert executive privilege. The Court advised counsel that if an appropriate affidavit is necessary it should be timely filed.[3]

On February 13, 1981, DOE filed its Further Statement Concerning Privilege Claims and submitted an affidavit of F. Scott Bush, Assistant Administrator for the Office of Regulatory Policy, Economic Regulatory Administration (ERA) of the United States Department of Energy (DOE). Attached to the Affidavit as Exhibit "A" is unnumbered "Economic Regulatory Administration Delegation Order No. _____," signed by David Bardin, Administrator for Regulations and Emergency Planning, effective July 19, 1979. Exhibit "B" is a memorandum dated July 19, 1978, to F. Scott Bush, Acting Assistant Administrator for Regulations and Emergency Planning from David J. Bardin, Administrator.[4]

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[3] On June 14, 1979, Cotton served its first request for production and interrogatories. On August 29, 1980, the Court entered its First Discovery Order and on November 18, 1980, the Second Discovery Order was entered. DOE asserted executive privilege for 47 documents on November 3, 1980, for 61 documents on December 15, 1980, and for 10 more documents on January 12, 1981. Cotton submitted a letter dated January 15, 1981, which the Court ordered filed as a Motion to Compel after the extended discovery hearing on January 23, 1981. On February 13, 1981, DOE filed its Further Statement Concerning Privilege Claims which contained the first submission of the Bush (Assistant Administrator for the Office of Regulatory Policy, Economic Regulatory Administration) affidavit in support of the pre-decisional or executive privilege claims.

[4] In *Coastal Corporation v. Duncan*, 4 CCH Energy Mgmt. ¶ 26,206 (D.Del. May 5, 1980), Judge Schwartz rejected DOE's contention the executive privilege could be claimed by Mr. Bush or delegated by Mr. Bardin. See also *Pennzoil Company v. Department of Energy*, United States District Court for the District of Delaware, Civil Action No. 78-335, unpublished Memorandum

Courts have consistently applied the executive privilege requirements set forth in *United States v. Reynolds,* 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953) to all claims of executive privilege. The Supreme Court said in *Reynolds, supra:*

> "The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." 345 U.S. at 7-8.

See also *Coastal Corporation v. Duncan,* 4 CCH *Energy Mgmt.* § 26,206 (D.Del. May 5, 1980), 27,743-27,744. Judge Schwartz has succinctly stated the applicable law relative to the assertion of executive privilege and this Court need not further elaborate.[5]

The Court further finds the assertion of executive privilege by DOE is not timely.[6] It was not submitted until after the January 23, 1981 discovery hearing. There is no contention on the part of DOE of lack of knowledge of prior judicial decisions as to the requisite manner in which executive privilege should be raised.

As Judge Schwartz said in *Coastal Corporation v. Duncan, supra:*

Opinion of Judge Stapleton of June 30, 1980; *Exxon Corp. v. DOE,* United States District Court for the Northern District of Texas, Civil Action CA 3-75-9836-W, unpublished order of June 9, 1980.

[5] It was there pointed out the Assistant Administrator of the subagency is without standing to assert the executive privilege.

[6] See footnote 3 *supra.*

> ". . . [i]t is clear, in light of the DOE's past and present behavior, that the Court must put an end to the DOE's tactics of refusing to comply with the well-established case law of this District. Permitting the DOE to revise its indices yet another time would only encourage the continuing use of such tactics. Therefore, having improperly raised its claims of privilege, DOE has, in effect, asserted no privilege at all and will be ordered to produce all documents withheld on the basis of executive privilege, attorney-client privilege and work-product privilege."

Having determined the executive privilege attempted to be asserted by DOE is both improper and untimely, the Court finds as to all documents in all Four Groups, there has been no executive privilege asserted to prevent production. The Court further finds the investigatory privilege asserted as to Document M is improper and untimely.[7]

WORK-PRODUCT PRIVILEGE:

DOE claims work-product privilege as follows: Group Two—claims 47, 67, 68, 74-81, 82 and 83; Group Four—Documents D, H, I, M and N.

The Court after examining the privileges claimed finds an *in camera* inspection (proffered by DOE on 1-23-81) of

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[7] The affidavit of Mr. Bush submitted February 13, 1981 deals with executive or pre-decisional privilege only. He states in paragraph 3, page 2: ". . . I have personally reviewed documents presented to me by the Office of General Counsel, in order to determine whether the government's privilege protecting pre-decisional, internal documents of a recommendatory or deliberative nature, should be invoked . . ."

No affidavit as to investigatory privilege has been submitted by Mr. Bush or government counsel. *Coastal Corporation v. Duncan, supra,* 27,746.

the documents for which the work product privilege is asserted is necessary.

In view of the Court's ruling herein it is unnecessary to discuss DOE's Vaughn Index in support of its privilege claims except to say in reference to many documents it lacks the required specification of facts to support the claim.

IT IS, THEREFORE, ORDERED as follows:

1. The claim of the DOE of executive or pre-decisional privilege is denied as to claims numbers 97-103, 35-96, 1-31 and documents A-E, H, I, M, N. In this connection, DOE should produce the subject documents to Cotton for inspection and copying on or before April 13, 1981 [except as to those documents for which the work-product privilege is also asserted]. The parties should present to the Court before April 13, 1981 an order relative to any protective measures deemed necessary. [See Order of Judge Schwartz in *Coastal Corporation v. Duncan, supra,* at 41 CCH *Energy Mgmt.* 27,750-27,751.

2. The defendant, DOE, should submit to the Court for an *in camera* inspection under seal the documents for which the work-product privilege is claimed on or before April 13, 1981.

3. The claim of the work-product privilege is held in abeyance pending the *in camera* inspection by the Court.

ENTERED this 30th day of March, 1981.

/s/ THOMAS R. BRETT
Thomas R. Brett
United States District Judge
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil No. 79-C-217-B

COTTON PETROLEUM CORPORATION, a Delaware corporation, *Plaintiff*,

vs.

JAMES B. EDWARDS, Secretary of Energy, and the UNITED STATES OF AMERICA, *Defendants*.

FIFTH DISCOVERY ORDER

(Filed June 30, 1981)

On March 30, 1981, this Court entered the Fourth Discovery Order in this case. As a part of that Order the Court held the work-product privilege[1] asserted by DOE be held in abeyance pending an *in camera* inspection by the Court.

The Court has reviewed the documents submitted by DOE for *in camera* inspection and finds the documents do not fall within the work-product privilege asserted and should be produced for the following reasons:

F.R.Civ.P. 26(b)(3) provides:

> ". . . a party may obtain discovery of documents and tangible things otherwise discoverable under subdivi-

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[1] "Although the work product rule is sometimes spoken of as creating a 'privilege,' it is more accurate to say that it gives a qualified immunity from discovery. The term 'privilege' invites confusion between the work product rule and the true privilege for confidential communications between attorney and client." 8 Wright & Miller, *Federal Practice and Procedure*, ¶ 2025, p. 211-212.

> sion (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

F.R.Civ.P. 26(b)(3) is a codification of the decision of the Supreme Court of the United States in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) The Supreme Court said at 511:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had . . ."

The *Hickman* court went on to say the "burden rests on the one who would invade the privacy to establish adequate reasons to justify production through a subpoena or court order."

The work product rule is the result of a balancing between the policy of full disclosure behind the federal discovery rules and the desire to promote the effectiveness of the adversary system by safeguarding the vigorous

representation of a client's cause from the possible debilitative effects of susceptibility to discover. *Hercules Inc.* v. *Exxon Corp.*, 434 F.Supp. 136, 160 (D.Del. 1977)

The scope of the work product privilege is limited, however, by the requirement that the documents be prepared "with an eye toward litigation."

In *Jordan v. U.S. Dept. of Justice*, 192 U.S.App.D.C., 144, 591 F.2d 753 (1978) [en banc], it was held:

> "The work-product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does. Its purpose is more narrow, its reach more modest. . . . [T]he purpose of the privilege is to encourage effective legal representation within the framework of the adversary system by removing counsel's fears that his thoughts and information will be invaded by his adversary. In other words, the privilege focuses on the integrity of the adversary trial process itself . . . This focus on the integrity of the trial process is reflected in the specific limitation of the privilege to materials 'prepared in anticipation of litigation or for trial.' " Id. at 775.

In examining the documents submitted by the DOE for *in camera* inspection, DOE must establish that litigation was fairly foreseeable at the time the documents were prepared. *Coastal State Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C.App. 1980). To argue that every audit is potentially the subject of litigation is to go too far. *Coastal State Gas Corp. v. Department of Energy, supra*, at 865; *Coastal Corporation v. Duncan*, 4 CCH Energy Mgmt. ¶ 26,206 (D.Del. May 5, 1980), 27,741, 27,748. The same rationale would apply to every Notice of Probable Violation (NOPV).

The Court, therefore, finds, after the *in camera* inspection of the documents to which the work product privilege

was asserted, the DOE has not established the probability of litigation when the documents were prepared.

IT IS, THEREFORE, ORDERED as follows:

1. The DOE produce to Cotton Petroleum Corporation within twenty (20) days from this date documents numbered 47, 67, 68, 74-83 and lettered D, H, I, M and N.

2. If a protective order is desired by the parties such protective order should be submitted to the Court within said twenty (20) days.

ENTERED this 30th day of June, 1981.

/s/ THOMAS R. BRETT
Thomas R. Brett
United States District Judge
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil No. 79-C-217-B

COTTON PETROLEUM CORPORATION, a Delaware corporation, *Plaintiff*,

vs.

JAMES B. EDWARDS, Secretary of Energy, and the UNITED STATES OF AMERICA, *Defendants*.

ORDER

(Filed June 30, 1981)

The Court has for consideration the following Motions filed by defendants:

1. Defendants' Motion to Certify Disclosure Order;

2. Defendants' Motion for Partial Stay of Fourth Discovery Order Pending Appellate Review.

After reviewing the briefs of the parties the Court finds the Motion to Certify Disclosure Order should be overruled. Inherent in this dispositive rule would be a denial of the defendants' Motion for Partial Stay of Fourth Discovery Order Pending Appellate Review.

28 U.S.C.A. § 1292(b) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . . Provided, however, that application for an appeal hereunder shall not stay pro-

ceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

The Court is not persuaded that the privilege issue or the timeliness issue involve a controlling question of law herein or that an interlocutory appeal would materially advance the ultimate termination of the litigation. Consequently, defendants' Motions should be denied.

IT IS, THEREFORE, ORDERED as follows:

1. Defendants' Motion to Certify Disclosure Order is denied;

2. Defendants' Motion for Partial Stay of Fourth Discovery Order is denied.

3. All other documents not yet produced but ordered produced by the Fourth Discovery Order should be produced within twenty (20) days from this date;

4. This case is set for pre-trial conference on the 24th day of July, 1981, at 8:30 A.M.

ENTERED this 30th day of June, 1981.

/s/ THOMAS R. BRETT
Thomas R. Brett
United States District Judge
Northern District of Oklahoma

Rule 26 of the Federal Rules of Civil Procedure provides, in pertinent part:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Fifth Amendment to the United States Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Opposition

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1359

In the Supreme Court of the United States

OCTOBER TERM, 1981

COTTON PETROLEUM CORPORATION, PETITIONER

v.

JAMES B. EDWARDS, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Department of Energy properly asserted a claim of deliberative process privilege in this case by means of a detailed descriptive index prepared by trial counsel and an offer to submit the documents in question for *in camera* inspection.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1359

COTTON PETROLEUM CORPORATION, PETITIONER

v.

JAMES B. EDWARDS, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 659 F. 2d 154. The orders of the district court (Pet. App. 6a-48a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) was entered on September 1, 1981. A petition for rehearing was denied on October 21, 1981 (Pet. App. 5a). On November 20, 1981, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 19, 1982, and the petition was filed on that date. In our view, the petition is jurisdictionally out of time. See note 4, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note.

STATEMENT

In 1979, the United States issued a Remedial Order that requires petitioner to make restitution of $714,677.90 in overcharges resulting from sales of crude oil (Pet. App. 6a). Petitioner then brought suit in the United States District Court for the Northern District of Oklahoma to challenge the agency's interpretation of 10 C.F.R. 212.72, upon which the order is based. Pursuant to petitioner's request for discovery of "contemporaneous construction" documents, the district court, on November 18, 1980, ordered the agency to identify virtually all documents generated between May 1973 and February 1976 concerning the meaning of the regulatory term "property" as applied to a unit of oil leases (Pet. App. 23a-30a). In response, approximately 900 documents were produced to petitioner by January 12, 1981 (*id.* at 32a). The agency also identified 111 documents, or portions of documents, that it deemed subject to the protection of the predecisional, deliberative process privilege. Of these documents, 106 remain in dispute.[1]

Adhering to the lower court's explicit direction (Pet. App. 20a-21a, 30a) to follow the procedures set forth in *Vaughn* v. *Rosen*, 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), government counsel asserted in writing that parts of the 106 documents were privileged, and submitted a lengthy index describing each document and providing a specific justification of the assertion of privilege. Thereafter, in a letter to the district court dated January 15, 1981, petitioner opposed the claims of privilege and requested a discovery conference (Pet. App. 32a). The court

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[1] In a related case, another district court reviewed *in camera* all but six of the 111 documents for which the privilege was claimed here. That court upheld the claim of deliberative process privilege on all but five documents and portions of two others. *United States* v. *Exxon Corp.*, Civ. No. 78-1035 (D.D.C. Jan. 22, 1982). Those documents have also been released to petitioner.

convened a conference eight days later at which it suggested that an *in camera* inspection might be the best way to proceed and at which the government offered to submit the documents to *in camera* inspection (see *id.* at 2a; Jan. 23, 1981 Tr. at 5). After hearing argument by the parties, the district court ordered that further briefs be filed and ordered petitioner's letter filed as a motion to compel discovery (see Pet. App. 32a, 39a n.3). On February 13, 1981, respondents submitted, in addition to their brief, an affidavit from F. Scott Bush, an Assistant Administrator of the agency to whom the agency head had expressly delegated authority to assert the privilege, attesting to the privileged nature of the documents.[2]

On March 30, 1981, the district court rejected the government's claim of privilege as both "improper and untimely" (Pet. App. 41a). Relying on *United States* v. *Reynolds*, 345 U.S. 1 (1953), the court held that the claim was improper because it was not asserted by affidavit of the head of the agency after personal examination of the documents (Pet. App. 39a-40a). The court stated that the claim was untimely because Bush's affidavit was not submitted until after the January 23, 1981, discovery conference (*id.* at 40a). Accordingly, the court ordered all the documents in question disclosed.[3]

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[2]Bush was the Assistant Administrator for the Office of Regulatory Policy, Economic Regulatory Administration of the Department of Energy. The Administrator was on extended leave at the time and hence was unavailable to lodge the claim of privilege. The government also submitted copies of affidavits of the Administrator, pertaining to 33 of the 111 documents, that had been submitted in a related case. *Pennzoil Co.* v. *DOE*, No. 78-335 (D. Del. Jan. 29, 1981); Pet. App. 37a-38a & n.2.

[3]The government had also asserted a work product privilege with respect to some of these documents. The court postponed ruling on this claim pending its *in camera* inspection of the documents in question. On June 30, 1981, the court rejected the claims of work product privilege (Pet. App. 43a-46a).

On June 30, 1981, the district court denied a motion to stay its disclosure order or to certify it as appealable under 28 U.S.C. 1292(b) (Pet. App. 47a-48a). The government sought a stay of the order and a writ of mandamus from the Temporary Emergency Court of Appeals (TECA). Petitioner filed a brief in opposition to the application for a stay, which addressed the merits of the district court's order, but the court of appeals granted a stay.

On September 1, 1981, TECA issued a writ of mandamus ordering the district court to determine whether the documents in question were subject to the deliberative process privilege (Pet. App. 1a-3a). The court of appeals held that the district court was incorrect in ruling that *United States* v. *Reynolds, supra,* required an affidavit from the head of the agency in these circumstances, pointing out that "*Reynolds* dealt with an absolute privilege for state secrets" (Pet. App. 2a). Citing *Kerr* v. *United States District Court,* 426 U.S. 394, 404-405 (1976), the court noted that this Court "has cast doubt on the advisability of *foreclosing* assertions of governmental privilege because the privilege was not claimed by a high ranking official" (*ibid.*; emphasis in original) and concluded that the privilege need not be asserted in all cases by the agency head (Pet. App. 2a-3a). The court also explained that, under *Vaughn* v. *Rosen, supra,* an affidavit of an agency official is not necessary to assert the privilege effectively when the agency has no objection to an *in camera* inspection of the documents by the district court (Pet. App. 2a). The court of appeals concluded that the Department of Energy had offered a timely, detailed, and specific justification of its claims of privilege, which required the district court to consider those claims (*id.* at 3a).

ARGUMENT

Petitioner contends (Pet. 8-24) that, because the privilege was not first asserted by an affidavit of the head of the agency, the government must disclose the documents in

question even if an *in camera* inspection would confirm that they are privileged. This contention does not warrant review by this Court.[4]

1. First, this contention is not presently ripe for review by this Court. The decision of the court of appeals only requires the district court to consider DOE's privilege claim on the merits. Petitioner is thus placed in the same position it would have occupied if the district court had originally found that the privilege claim had been properly asserted and had determined to consider the claim on the merits—a

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[4]At the outset, we note that the petition for a writ of certiorari appears to be jurisdictionally out of time. Section 211(g) of the ESA, 12 U.S.C. 1904 note, provides in pertinent part:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. * * *

The petition for rehearing was denied on October 21, 1981, but the petition for a writ of certiorari was not filed until January 19, 1982. The time limits established by Congress for petitioning for certiorari are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner did obtain an extension of the time for filing a petition in this case. However, neither Section 211(g) nor 28 U.S.C. 1254 explicitly authorizes such an extension of time. The general time provision for filing a certiorari petition in a civil case, 28 U.S.C. 2101(c), does permit extensions of up to 60 days, but that subsection also grants a litigant an initial 90-day period within which to file a petition. There is no evidence that Congress intended the 90-day initial period of Section 2101(c) to be inapplicable to TECA cases, as it surely is in light of Section 211(g), yet intended to allow the 60-day extension period to be applied in such cases. Indeed, if the availability of a 60-day extension is implied, the purpose of substituting a 30-day time limit for the 90-day time limit of 28 U.S.C. 2101(c)—namely, to expedite review of TECA cases (see S. Rep. No. 92-507, 92d Cong., 1st Sess. 10 (1971))—would be substantially defeated. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 820-821 (1980).

determiniation that petitioner could not have appealed at that time. If, on remand, the district court rejects the privilege claim, the issue presented in the petition will become moot. If, on the other hand, the privilege claim is upheld, petitioner can present its present contention to this Court, together with any other claims it might have, in a petition for a writ of certiorari following final judgment.[5] Accordingly, review by this Court of the court of appeals' decision would be premature at this time. See, *e.g., Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916).

2. In any case, petitioner's contention is without merit. As the court of appeals explained (Pet. App. 2a), this Court's decision in *United States* v. *Reynolds*, 345 U.S. 1 (1953), does not require that every privilege by the government in discovery proceedings be asserted by the head of the affected agency after personal consideration of the documents. *Reynolds* involved the invocation of an absolute privilege for state secrets. Because this privilege is not lightly to be invoked, the Court noted that a formal claim of privilege must be asserted by the head of the department with control over the matter. *Id.* at 7-8. The Court did not suggest that review by the head of the department would be necessary in the case of the predecisional privilege, where the assertion of the privilege does not depend on a significant policy determination by the agency head. Moreover, *Reynolds* does not deal with the situation where the agency is willing to submit the documents to an *in camera* inspection. The specific requirements enunciated in *Reynolds*

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[5]Indeed, even without the contested documents, petitioner has since filed a motion for partial summary judgment on the basic issue concerning the interpretation of 10 C.F.R. 212.72. A ruling on that motion has been stayed pending TECA's decision in the related *Pennzoil* case. See note 2, *supra*.

were aimed at preserving judicial control over privilege claims without jeopardizing the security of the documents even to the extent of an *in camera* inspection. *Id.* at 9-10. Where the agency freely submits the documents to an *in camera* inspection, clearly it alleviates the concern expressed in *Reynolds* about abdication of "[j]udicial control * * * to the caprice of executive officers" (*ibid.*).

The district court here directed the Department of Energy to comply with the discovery request by following the procedures set forth in *Vaughn* v. *Rosen*, 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The agency satisfied this request by preparing a detailed "*Vaughn* index" identifying the privileged material. Recognizing that the government's predecisional privilege in discovery proceedings is analogous to Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5) (cf. *EPA* v. *Mink*, 410 U.S. 73, 91 (1973)), TECA also looked to *Vaughn* in assessing whether the privilege had been asserted properly. As the court of appeals found (Pet. App. 2a), *Vaughn* does not require an affidavit by high-ranking agency officials asserting the privilege when the agency is not attempting to avoid *in camera* inspection. See also *EPA* v. *Mink*, *supra*, 410 U.S. at 93; *Crooker* v. *Office of Pardon Attorney*, 614 F. 2d 825, 828 (2d Cir. 1980); *Black* v. *Sheraton Corp.*, 564 F. 2d 531, 542-543 (D.C. Cir. 1977). Indeed, this Court has recognized repeatedly that *in camera* inspection is a "highly appropriate and useful" method of enabling a court to assess the validity of a privilege claim. *Kerr* v. *United States District Court*, 426 U.S. 394, 406 (1976); see also *EPA* v. *Mink*, *supra*, 410 U.S. at 91-94; *United States* v. *Reynolds*, *supra*, 345 U.S. at 10.[6]

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[6]Petitioner suggests (Pet. 24) that this Court has held that, because of the burden on district courts, government documents for which a privilege has been asserted should sometimes be disclosed without *in camera* inspection. This suggestion is a distortion of this Court's decision in *EPA* v. *Mink*, *supra*. The passage quoted in the petition

Petitioner's contention (Pet. 12-13) that the decision below conflicts with decisions in several other circuits is similarly without merit. Petitioner relies primarily on language in *Association for Women in Science* v. *Califano*, 566 F. 2d 339, 347 (D.C. Cir. 1977), stating that *Reynolds* requires all claims of executive privilege to be lodged by the head of the agency. This decision is not inconsistent with the decision below. First, the court in *Association for Women in Science* held that the privilege claim there was properly asserted by the United States Attorney, who was not the head of the agency. *Id.* at 347-348. Furthermore, there is no suggestion in that case that the documents were being made available for *in camera* inspection, and the District of Columbia Circuit has indicated in other cases its agreement with the court below that affidavits are necessary only when the agency seeks to avoid *in camera* inspection. See *Coastal States Gas Corp.* v. *DOE*, 617 F. 2d 854, 861 (D.C. Cir. 1980); *Black* v. *Sheraton Corp., supra*, 564 F. 2d at 542-543. By the same token, the other court of appeals cases cited by petitioner generally do no more than restate the *Reynolds* rule; none of them remotely suggests that, where the documents are made available for *in camera* inspection, the absence of an affidavit requires an automatic rejection of the privilege claim.

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explains only that in some cases a government claim of privilege may be *upheld* without the need for *in camera* inspection; it does not suggest that documents offered by the government for such inspection should nevertheless be released without inspection in lieu of ruling on the privilege claim. See 410 U.S. at 93.

The *Mink* Court also pointed out that the burden of *in camera* inspection can be minimized by examining a representative sample of documents. *Ibid.* Certainly there is no reason to believe that *in camera* inspection here, which was first suggested by the district court and was conducted with respect to the work product claims, would be unduly burdensome; indeed, another district court in the *Exxon* case has already conducted an *in camera* examination of almost all of the documents at issue in this case. See note 1, *supra*.

3. Petitioner's attack on the assertion of the privilege by trial counsel in this case ignores the fact that, in addition to the offer of *in camera* inspection relied on by TECA, the government filed detailed affidavits by high-ranking agency officials asserting the privilege. While the affidavit for all of the documents was not signed by either the Secretary of Energy or the Administrator of the Economic Regulatory Administration, who was on leave at the time, petitioner cites no case holding that an agency head is prohibited from delegating to another high-ranking agency official the authority to assert the predecisional privilege. Indeed, the cases relied on by petitioner suggest the contrary. See, *e.g., Branch* v. *Phillips Petroleum Co.*, 638 F. 2d 873, 883 (5th Cir. 1981).

The affidavits were timely filed on February 13, 1981, in direct response to the district court's statement on January 23, 1981, that petitioner's letter requesting a discovery conference would be treated as a motion to compel discovery. See, *e.g., Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 942-947 (Ct. Cl. 1958). Government counsel, in accordance with Rule 34(b) of the Federal Rules of Civil Procedure, previously had objected to the production of each contested document in responding to petitioner's discovery requests. A detailed explanation for each claim of privilege was submitted at that time. This gave petitioner full knowledge of the nature of the privilege claim without requiring a high-ranking agency official to be diverted from his duties in order to review documents that ultimately might not be sought. Upon being notified that petitioner was filing a motion to compel production of all of the documents, the government filed affidavits addressed to those documents.[7]

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[7]In any event, even assuming arguendo that there was some defect in the manner in which the agency first notified petitioner that some documents were privileged, because of the absence of an affidavit from

The unyielding rule sought by petitioner would impose a severe and unwarranted burden on agency heads as a result of routine discovery requests. A broad discovery request such as the one involved in this case will often cover some documents subject to the predecisional or other privilege. Under petitioner's submission, any agency would forfeit its privilege, with the resulting harm to the public interest, unless its initial notification to the requesting party that some documents are privileged is accompanied by an affidavit of the agency head attesting that, based on his personal examination, each of the documents is privileged, even though some or all of the documents might never be the subject of a motion to compel. This requirement would unnecessarily interfere with the agency head's performance of his important duties and would only delay response to discovery requests. See *Association for Women in Science* v. *Califano, supra,* 566 F. 2d at 347-348. The procedure followed here is clearly preferable. The agency's initial notification of its claim of privilege was made by counsel with a detailed explanation of the basis for the claim. Once petitioner elected to contest the privilege claim by filing a motion to compel discovery of all of the documents, then the agency bore the burden of proving its privilege claim—either by offering the documents for *in camera* inspection or by submitting an appropriate affidavit (or, as here, by

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the head of the agency, such a procedural defect should not irrevocably foreclose any privilege claim. Rather, the important policies underlying the protection against disclosure of privileged documents require that the agency be given some opportunity to correct a procedural defect, thus enabling it to have its claim of privilege resolved on the merits. See, *e.g., Kerr* v. *United States District Court, supra,* 426 U.S. at 404-405; *Coastal States Gas Corp.* v. *DOE,* 644 F. 2d 969, 981 (3d Cir. 1981); *Branch* v. *Phillips Petroleum Co., supra,* 638 F. 2d at 883; *Mead Data Central, Inc.* v. *United States Department of the Air Force,* 566 F. 2d 242, 248-252 (D.C. Cir. 1977).

both). This procedure fully complies with *Reynolds* and fully maintains judicial control over executive assertions of the deliberative process privilege.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1982

DOJ-1982-03